No. 93-232

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

JOHN A. LUPARELLI, Administrator of the Estate of
RICHARD R. LUPARELLI, Deceased,
Petitioner,

v.

CARLETTA J. SOHN and JONG SOO SOHN,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED

1. WHETHER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION PROHIBIT THE ASSESSMENT OF "DAMAGES FOR DELAY" AMOUNTING TO 50% OF A JURY VERDICT AGAINST THE DEFENDANT IN A PERSONAL INJURY CASE WHERE THE DEFENDANT'S CONDUCT NEITHER CONTRIBUTED TO THE DELAY OF TRIAL NOR IMPEDED SETTLEMENT OF THE CLAIM AND WHERE THE STATE COURT RULE WOULD REQUIRE THE DEFENDANT, IN ORDER TO AVOID SAID PENALTIES, TO GUESS CORRECTLY AT THE JURY VERDICT.

2. WHETHER THE MECHANISM REQUIRED BY RULE 238 OF THE PENNSYLVANIA RULES OF CIVIL PROCEDURE TO MEASURE THE REASONABLENESS OF A CIVIL DEFENDANT'S SETTLEMENT OFFERS, AS AFFIRMED BY THE SUPERIOR COURT OF PENNSYLVANIA, IS UNCONSTITUTIONAL UNDER STANDARDS ESTABLISHED BY PRECEDENT OF THE SUPREME COURT OF THE UNITED STATES.

3. WHETHER THE AMOUNT OF THE PENALTY ASSESSED AGAINST PETITIONER IS UNREASONABLE UNDER THIS COURT'S INTERPRETATION OF THE DUE PROCESS AND EQUAL PROTECTION REQUIREMENTS OF THE FOURTEENTH AMENDMENT.

PARTIES TO THE ACTION

All parties to the proceeding in the Court below are named in the caption in the Supreme Court.

As this Petition questions the constitutionality of a Rule of Civil Procedure adopted by the Pennsylvania Supreme Court, 28 U.S.C. §2403(b) may be applicable.

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No.

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OPINIONS BELOW

The final Order of the Supreme Court of Pennsylvania denying Petitioner's Petition for Allowance of Appeal has not been officially reported. It is presented in the Appendix to this Petition at page A-1.

The Order of the Pennsylvania Superior Court, entered on July 16, 1992 and reported at 616 A.2d 726 (Pa. Super, 1992) and

is presented in the Appendix at page A-2. The Memorandum Opinion of the Superior Court is presented in the Appendix at page A-3.

The Opinion of the Trial Court is presented in the Appendix beginning at page A-12.

JURISDICTION

1 The denial of Petitioner's Petition for Allowance of Appeal was entered by the Pennsylvania Supreme Court on May 18, 1993. Under Pennsylvania Rules of Appellate Procedure, the Pennsylvania Supreme Court's review is discretionary. The judgement of the Pennsylvania Superior Court, affirming the trial court's imposition of delay damages, entered on July 16, 1992 is a final order.

2. The federal question, concerning the constitutionality of Pennsylvania Rule of Civil Procedure Number 238 as applied in this case, was raised at the trial court level in response to Respondent's post trial motion for imposition of damages for delay under Rule 238, as indicated in the Opinion at Appendix page A-15 and in Petitioner's Statement in Opposition to Imposition of Damages for Delay, presented in the Appendix at pages A-25-28. The issue was preserved and addressed before the Pennsylvania Superior Court, Appendix page A-6, and was the basis for the Petition for Allowance of Appeal to the Pennsylvania Supreme Court.

3. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S.C.A. Constitution, 5th Amendment: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in a criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S.C.A. Constitution, 14th Amendment, Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 Pa.C.S.A., Rules of Civil Procedure, Rule 238:

Damages for Delay in an Action for Bodily Injury, Death or Property Damage.

(a) (1) At the request of the plaintiff in a civil action seeking monetary relief for bodily injury, death or property damage, damages for delay shall be added to the amount of compensatory damages awarded against each defendant or additional defendant found to be liable to the plaintiff in the verdict of a jury, in the decision of the Court in a non-jury trial or in the award of arbitrators . . . and shall become part of the verdict, decision or award.

(2) Damages for delay shall be awarded for the period of time

(i) In an action commenced before August 1, 1989, from the date the plaintiff first filed a complaint or from a date one year after the accrual of the cause of

action, whichever is later, up to the date of the award, verdict or decision; or

(ii) In an action commenced on or after August 1, 1989 from a date one year after the date original process was first served in the action up to the date of the award, verdict or decision.

(3) Damages for delay shall be calculated at the rate equal to the prime rate as listed in the first edition of the Wall Street Journal published for the calendar year for which the damages are awarded, plus 1%, not compounded.

(b) The period of time for which damages for delay shall be calculated under subdivision (a)(2) shall exclude the period of time, if any

(1) After which the defendant has made a written offer of

(i) Settlement in a specified sum with prompt cash payment to the plaintiff, or

(ii) A structured settlement underwritten by a financially responsible entity,

and continued that offer in effect for at least 90 days or until commencement of trial, whichever first occurs, which offer was not accepted and the plaintiff did not recover by award, verdict or decision, exclusive of damages for delay, more than 125% of either the specified sum or the actual cost of the structured settlement plus any cash payment to the plaintiff; or

(2) During which the plaintiff caused delay of the trial.

(c) Not later than ten days after the verdict or notice of the decision, the plaintiff may file a written motion requesting damages for delay and setting forth the computation.

(1) Within ten days after a motion is filed, the defendant may answer specifying the grounds for opposing the plaintiff's motion. The averments of the answer shall be

deemed denied. If an issue of fact is raised the court may, in its discretion, hold a hearing before entering an appropriate order.

(2) If the Defendant does not oppose the motion, the court shall add the damages for delay to the verdict or decision.

(3) (i) If a motion for post-trial relief has been filed under Rule 227.1 and a motion for delay damages is opposed, a judgment may not be entered until all motions filed under Rule 227.1 and this Rule have been decided.

(ii) If no motion for post-trial relief is filed within the ten-day period under Rule 227.1, but the Defendant opposes the motion for delay damages, the Plaintiff may enter judgment on the verdict or decision. Thereafter, upon deciding the motion for damages for delay, the court shall enter judgment for the amount of the delay damages, if any . . . [Section (d) referring to Arbitration cases is omitted.]

(e) This rule shall not apply to

(1) Eminent Domain proceedings;

(2) actions in which damages for delay are allowable in absence of the rule;

(f) This rule shall apply to actions pending on or after the effective date of this rule in which the damages for delay have not been determined.

Adopted and effective November 7, 1988 (Purdon's Supplement 1993).

PETITION FOR CERTIORARI

Petitioner respectfully seeks a Writ of Certiorari for review of the Order of the Superior Court of Pennsylvania affirming the trial court's imposition of damages for delay against Petitioner under Rule 238 of the Pennsylvania Rules of Civil Procedure. These "damages" amounted to 50% of the jury award and were automatically assessed against Petitioner, defendant below, in spite of the fact that defendant had done nothing to delay trial and had made several reasonable and prompt settlement offers to plaintiff, which were rejected and where plaintiff's demand at all times greatly exceeded the jury award. The Superior Court's Order was the subject of a Petition for Allowance of Appeal to the Pennsylvania Supreme Court. That petition was denied.

This petition presents important questions of federal constitutional law concerning the requirements of the Due Process and Equal Protection Clauses of the 14th Amendment. The decision below upholding the constitutionality of Rule 238 conflicts with this Court's pronouncements on the subject and implicitly challenges settled precedent of this Court.

Statement of the Case:

In 1985 Petitioner's decedent and the Respondents were involved in an automobile accident. The Respondents instituted suit in the Court of Common Pleas of Philadelphia County in July, 1986, each claiming damages in an unstated amount for personal injuries in the nature of soft tissue injuries and the resulting pain and suffering, mental and emotional distress, loss of life's pleasures, sleeplessness, traumatic neuroses, humiliation, fear, worry, loss of future earnings and future medical expenses and loss of marital consortium, and the like. App. p. A-37. Through no fault of either party the case was not called to trial until April of 1991. A jury verdict was entered in favor of the plaintiffs below in the amount of $64,250.00 for Carletta Sohn and in the amount of $8,250.00 for Jong Soo Sohn. App. p. A-10.

Following entry of the verdict, the trial court applied Rule 238 to augment the total verdict of $72,500.00 by the sum of $35,519.55. App. p. A-10. This represented an increase of approximately 50% over the jury verdict which amount was

awarded as "damages for delay". The trial court, in addressing Petitioner's objections[1] ruled that the Rule required an automatic imposition of damages against Petitioner though Petitioner's conduct did nothing to contribute to the delay of trial, App. P. A-16, and though the Petitioner had continually attempted to settle the case throughout litigation by offering sums of $35,000.00,[2] $46,000.00[3] and an unspecified amount which was interpreted by the plaintiff below as being an offer of $86,000.00[4]. Each of these offers had been rejected by the plaintiffs who continually demanded the sum of $250,000.00 in settlement[5].

A timely appeal to the Superior Court was taken wherein Petitioner again raised, inter alia, the federal constitutional challenges addressed to the trial court. The Superior Court's disposition of those challenges is presented in the Appendix at page A-6, 7. Petitioner then filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court. The Petition was denied without comment. App. p. A-1. However, one month later, the Supreme Court of Pennsylvania issued an opinion in the matter of *Costa v. Lauderdale Beach Hotel*, ____ Pa. ___ , 626 A.2d 566 (1993). Therein the Court upheld the constitutionality of Rule 238 affirming imposition of delay damages against a defendant for a 5 year period in which no settlement offers were extended.

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1. Petitioner raised objections to imposition of damages for delay as violative of 14th Amendment of U.S. Constitution in formal Answer to Motion for Delay Damages and Statement of Opposition to Imposition of Damages for Delay. App. pp, 25, 27.

2. This amount was offered on June 10, 1988 by way of letter. App. p. A-29. The trial court's reference to these offers is found at App. p. A-13.

3. This amount was offered by way of letter in July of 1988. App. p. A-31.

4. In November of 1989 the offer of $46,000.00 was increased by way of letter in which the defendant's attorney stated, "In reviewing my file I note that the prior offer of $46,000.00 was tendered to, but rejected by, plaintiffs. Defendant hereby augments that amount by plaintiffs' out of pocket expenses". App. p. A-33. On April 26, 1990 the plaintiffs' attorney stated that he interpreted the last offer to "amount to $86,000.00". This amount was likewise rejected and the demand of $250,000.00 was once again made. App. p. A-34.

5. App. pp. A-30, 32, 34.

Brief History of Rule 238:

Perhaps no Rule of Civil Procedure has given rise to as much acrimonious judicial debate as Rule 238 of the Pennsylvania Rules of Civil Procedure, 42 Pa. C.S.A. First promulgated by the Pennsylvania Supreme Court in 1978 as a procedural device designed to "alleviate delay in the disposition of cases by prompting meaningful negotiations," *Laudenberger v. Port Authority of Allegheny County*, 496 Pa. 52, 59, 436 A.2d 147, 151 (1981), the rule imposed upon defendants, in personal injury, property loss and death cases, pre-judgment interest at a rate of 10% per annum for each year the case was in litigation. The sanction was to be imposed only upon defendants whose pretrial settlement offers did not amount to 80% of the jury award, and for those periods where such an offer had not been extended.

Within months of its birth, the rule was stricken as violative of Federal and State Constitutions and beyond the Court's rule-making authority,[6] but the Supreme Court reversed, holding the rule constitutional in spite of harsh dissent within the Court. *Laudenberger,* 436 A.2d at 157 (Roberts, J. dissenting).[7]

By 1986, the Court recognized that the rule was indeed unconstitutional in its application as it presumed that the delay inherent in civil litigation was caused by the recalcitrant attitude of defendants. As the Court acknowledged "there is no point in contending that a procedural rule may exist that punishes without fault, and yet is consistent with Due Process." *Craig v. Magee Memorial Rehabilitation Center,* 512 Pa. 60, 64, 515 A.2d 1350, 1352 (1986). Justice Larson, in a dissenting Opinion, expressed the rationale that has consistently been used to support Rule 238 that although fault for delay may not rest with defendant necessarily, "a defendant can always protect himself from assessment of pre-judgment interest by extending a reasonable settlement offer in a timely manner." 515 A.2d at 1355, citing *Laudenberger,* 496 Pa. at 69-70, 436 A.2d at 156.

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6. Pennsylvania's Constitution permits the Court to prescribe general rules governing practice, procedure and conduct of all courts if such rule has neither abridged, enlarged nor modified the substantive rights of any litigant. Pennsylvania Constitution, Art. V, §10(c).

7. See note 11, *infra.*

After a two year hiatus, Rule 238 was reborn with minor alterations. The rule now provides that a defendant may escape the harsh financial impact of the rule if he makes a prompt settlement offer within 80% of the ultimate jury verdict *or* if he can prove that the plaintiff was the party responsible for delay in the matter coming to trial. Unfortunately, the new rule again ignored the reality of litigation in this day and age, that most court delays are not caused by any party but by the sheer volume of personal injury litigation and understaffed court systems. This fact was noted time and again by dissenting members of various Superior Court panels who continued to attack the constitutionality of the rule. See, *Dietrich v. J.I. Case Co.*, 390 Pa.Super. at 491, 568 A.2d at 1272, 1280 (Cirillo, J., dissenting) , *Schrock v. Albert Einstein Medical Center,* 386 Pa.Super. 215, 221, 562 A.2d 875, 877 (1989) (en banc), (Popovich, J.P., dissenting), *Ceresini v. Valley View Trailer Park,* 380 Pa.Super. 416, 419, 552 A.2d 258, 260 (1988) (en banc) (Cirillo, P.J., dissenting). While the Superior Court has consistently upheld the constitutionality of the rule, the conceptual foundation of these decisions has been unclear as noted by the U. S. Court of Appeals for the Third Circuit: "they seem to reflect the Superior Court's reluctance to declare unconstitutional a Rule promulgated by the Pennsylvania Supreme Court." *Knight v. Tape,* 935 F.2d 617, 626 (3rd Cir. 1991).[8]

While the Pennsylvania Supreme Court, prior to the issuance of the Superior Court's decision in this case, had not specifically addressed any preserved constitutional challenge to Rule 238, it did refer to the validity of the Rule in *dicta* in the matter of *Schrock v. Albert Einstein Medical Center,* 527 Pa. 191, 589 A.2d 1103 (1991) (wherein Appellant had waived any constitutional challenge to Rule 238). Therein, the Court, per Justice Larson, reiterated the position taken in the dissent in *Craig:* that the Rule worked no unconstitutional prejudice to

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8. For example, in *Dietrich v. J.I. Case*, the Superior Court noted: "we, therefore, hold Rule 238 as not patently unconstitutional and any further determination in this respect can only emanate from the Supreme Court. We also mention the reminders in the Supreme Court's pointed statements to this Court, expressed in opinions of that Court, that we may not ignore its decisions (or rules)." 587 A.2d 1272, 1279.

defendants as "defendants can readily protect themselves from the assessment of delay damages by making a prompt settlement offer in writing that bears a substantial relationship to the actual damages in the case," 589 A.2d at 1106. Until *Costa v. Lauderdale Beach Hotel*, ____ Pa. ____, 626 A.2d 566 (1993), the Supreme Court of Pennsylvania had remained silent on the issue of constitutionality of Rule 238 after *Craig, supra.* In no case addressed by the Pennsylvania Supreme Court had the Court been presented with facts as here, where the defendant has made prompt and reasonable settlement offers, which offers were rejected by the plaintiffs and where defendant has been required to pay additional damages simply by virtue of an inaccurate guess as to the amount of the jury's award.

The Federal Courts have considered Rule 238 in the matter of *Knight v. Tape, supra,* upholding delay damages as applied in a case where the defendant made no offer in settlement until trial and where defendants apparently did not argue that their pretrial settlement conduct was "reasonable" notwithstanding the jury verdict.

This Honorable Court has considered the applicability of Rule 238 to an FELA Defendant in *Monessen v. Southwestern Ry. Co. v. Morgan,* 86 U.S. 1306 (1988), discussed, *infra,* p 12.

Reasons for Petition:

This petition presents important questions of federal constitutional law: whether the due process and equal protection clauses of the 14th Amendment to the United States Constitution prohibit the assessment of "damages for delay" amounting to 50% of a jury verdict against the defendant in a personal injury case where the defendant's conduct neither contributed to the delay of trial nor impeded settlement of the claim and where the state court rule would require the defendant, in order to avoid said penalties, to guess correctly at the jury verdict.

Upon this Court's grant of the requested Writ, Petitioner will argue that Rule 238 is unconstitutional under the 14th

Amendment in several regards.[9] The issues, drawn narrowly for the purpose of this Petition, are whether a defendant, sued for damages for personal injuries in the nature of pain and suffering, negligent infliction of emotional distress, loss of marital consortium and other unliquidated economic and non-economic claims, may properly be required to accurately determine the dollar figure of the ultimate jury award and tender an amount equal to at least 80% of that figure, or suffer the automatic imposition of additional damages for failing to guess this amount correctly. As the trial court below noted, your Petitioner, the defendant below, did nothing to delay the trial of the case, App. p. 16 and made repeated settlement overtures to the plaintiff which were consistently rejected and countered by a demand that greatly exceeded the jury verdict. App. pp A29-34. Defendant below was never adjudicated to be dilatory in any regard in this matter; on the contrary, a sanction of 50% of the jury award was automatically imposed in the absence of any hearing on the reasonableness of his conduct.

Prior decisions of this Court have held such a rule invalid. The continued vitality of this Court's precedent is therefore implicated. The case also raises fundamental questions about the rights of the state to assess penalties against unsuccessful litigants that were recently raised by this Court in *Bankers Life and Cas. Co. v. Crenshaw,* 486 U.S. 71, (1988).

1. *Under this Court's 14th Amendment jurisprudence, Rule 238 is unconstitutional under both a strict scrutiny and rational relation test for due process and equal protection infringements.*

   A. *Rule 238 significantly affects the substantive and fundamental rights of litigants requiring strict scrutiny of the state action.*

In 1988 the Pennsylvania Supreme Court enacted the current manifestation of Rule 238 "Damages for Delay in Actions for Bodily Injury, Death or Property Damage" Pa.R.Civ.P. Rule

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9. See Justice Roberts' dissent in *Laudenberger,* 496 Pa. 52, 436 A.2d 147, 160, *infra.*, fn 11.

238, 42 Pa.C.S.A. Labeled a "procedural rule,"[10] it was designed to foster settlement negotiations, and thereby unclog the courts,[11] by requiring the defendant to make a reasonable settlement offer to the plaintiff at the risk of imposition of additional damages calculated at a fluctuating percentage rate to be applied for each year in which the case was open. In those counties of the Commonwealth where backlogs of court dockets cause a delay of many years, damages for delay amounting to 50%, or higher, are common.

The Pennsylvania Supreme Court's repeated assertion that Rule 238 is merely a procedural rule and hence not substantively affecting a defendant's property rights was addressed and rejected by this Court in *Monessen Southwestern Ry. v. Morgan*, 486 U.S. 1306, (1988) wherein this Court found that imposition of damages under Rule 238 represented a substantive change in the obligations of the defendant and could not be imposed in an action arising under the Federal Employers Liability Act. In reversing, this Court noted that three dissenting justices in the Pennsylvania Supreme Court sharply criticized the majority's classification of the rule.

> They dismissed as 'pure sophistry' the majority's assertion that Rule 238 was a mere procedural device, observing that 'any rule which increases a damage award by twenty-five percent has an undeniably material effect on damages.' 513 Pa. at 101-102, 518 A.2d at 1179
>
> *Monessen Southwestern Ry., supra*, 486 U.S. at 333, fn.2.

As Rule 238 has been found to be no mere procedural device but a substantive change in the obligation of the defendant in a civil action, the protections of the 14th Amendment of the U.S. Constitution must be afforded him before additional liabilities under the rule may be incurred. The 5th Amendment of the United States Constitution provides in pertinent part: "No person shall be . . . deprived of . . . property without due process of law" U.S.C.A. Constitution, Amend. 5. The 14th

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10. *Laudenberger v. Port Authority of Allegheny Co.* , 496 Pa. 52, 436 A.2d 147 (1981).

11. *Schrock v. Albert Einstein Medical Center*, 527 Pa. 191, 589 A.2d 1103, 1106 (1991).

Amendment to the United States Constitution forbids the states to "deprive any person of life, liberty or property, without due process of law; nor deny to any person . . . the equal protection of the laws". U.S.C.A. Constitution, Amend. 14.

Petitioner's right of access to the courts to protect his property is constitutionally protected by the 14th Amendment. *Logan v. Zimmerman Brush Company,* 455 U.S. 422, 429 (1982). Under this Court's interpretation, the 14th Amendment will prevent states from denying a litigant the use of established adjudicatory procedures when "such action would be the equivalent of denying them an opportunity to be heard upon their claimed rights." *Id.,* 455 U.S. at 430, *citing Boddie v. Connecticut,* 401 U.S. 371, 380 (1971).

Rights in property are basic civil rights, *Lynch v. Household Finance Corporation,* 405 U.S. 538 (1972). They are to be afforded no less protection than interests in life or liberty. U.S.C.A. Constitution Amend. 5, 14. When fundamental rights are involved, regulations limiting those rights may be justified only by a compelling state interest, and the legislation must be narrowly drawn to protect only those legitimate state interests at stake, *Roe v. Wade,* 410 U.S. 113 (1973).

Petitioner will argue, upon grant of this petition, that the threat of an imposition of substantial damages in order to compel acquiescence in an unreasonable settlement demand is, in itself, a violation of the due process clause of the 14th Amendment. Furthermore, the mechanism chosen by the state to achieve its goal of unclogging the court is to impose substantial penalties upon a defendant for his failure to accurately guess at the ultimate jury verdict and to offer plaintiff an amount within 80% of that figure. If the defendant guesses wrongly at the verdict and if his pretrial settlement offer to the plaintiff is rejected, he is penalized. Yet no similar mandate compels the plaintiff to demand an amount in line with the jury award or even to participate in settlement negotiations at all. *Schrock, supra,* 589 A.2d at 1105, n.l.[12]

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12. The full scope of the due process and equal protection violations inherent in the rule have been cogently noted by the late Justice Roberts in his dissent in *Laudenberger,* addressing original Rule 238:

Because of the fundamental nature of the defendant's interest, a strict scrutiny test must be applied to these issues. Upon application of such a test the rule must fail. Numerous less restrictive or less imposing alternative means are available to effect the state's legitimate interest. At the very least, a post trial "hearing" to determine the reasonableness of defendant's conduct and pretrial settlement offers would satisfy most concerns. Much more has been required by this Court in cases dealing with less fundamental rights. *United States Department of Agriculture v. Murry,* 413 U.S. 508 (1973) (right to Food Stamp Act benefits); *Vlandis v. Kline,* 412 U.S. 441 (1973) (right to tuition discount for state residents); *Bell v. Burson,* 402 U.S. 540 (1971) (right to pretrial possession of drivers license in absence of bond); *Sherbert v. Verner,* 374 U.S. 398 (1963) (right to receipt of continued unemployment compensation benefits); *Slochower v. Board of Higher Education,* 350 U.S. 551 (1956) (right to continuance of public employment).

B. *Rule 238 is unconstitutional even under rational relation scrutiny as it is based upon arbitrary classifications, irrational presumptions and utilizes impermissible irrebuttable presumptions of fault.*

The constitutional infirmity of Rule 238 is such that the rule cannot survive even a rational relation examination on due

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NOTES *(Continued)*

Rule 238 imposes arbitrary, unreasonable and unequal burdens in the absence of tangible evidence that such measures will serve to accomplish the Rule's intended purpose of eliminating delay.

Rule 238 automatically imposes liability without regard to the good or bad faith of the defendant. One defendant can make a settlement offer which would appear reasonable and yet be subjected to the . . . penalty if the fact finders award should exceed the offer by 26%. . . .

Rule 238 imposes a penalty even where a fact finder's award is within 125% of the settlement offer. Interest is to be computed either from the date the complaint is filed or from one year after the accrual of the cause of action, whichever is the later date. . . .

The unfairness of Rule 238 is further compounded by its imposition of duties and sanctions only upon defendants and not upon plaintiffs. If the object of the rule is to discourage delay, the rule should not only require defendants to make reasonable settlement offers, but should also require plaintiff's to make reasonable demands.

Id., at 436 A.2d 160.

process or equal protection grounds. The rational relation test requires, for the due process analysis, that a statute further a legitimate state goal by rational means. *General Motors Corp. v. Romein*, ____, U.S. ____, 112 S.Ct. 1105, ____ (1992). For equal protection analysis, the test requires that a classification be reasonably drawn so as to rationally further a legitimate state interest, *Nordlinger v. Hahn*, ____ U.S. ____, 112 S.Ct. 2326, 2331 (1992), *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439-441 (1985).

(1) *Rule 238 fails to pass the rational relation test for due process compliance.*

Petitioner admits that the state's goal behind Rule 238, to foster settlement negotiations by requiring defendant to make a prompt reasonable settlement offer, *Laudenberger, supra,* 436 A.2d at 151, may be a legitimate one. The question is whether the means selected are rationally related to the goal. *General Motors Corp. v. Romein,* ____ U.S. ____, 112 S.Ct. 1105, ____ (1992). As the goal of Rule 238 seeks to regulate the conduct of defendants in personal injury cases, reason dictates that those defendants be given, in advance, the standard by which their conduct will be judged. This is not the case with Rule 238.

Although the Pennsylvania courts have repeatedly intimated that defendants possess some degree of omniscience or heightened prognosticative skills which would permit them to know well in advance of trial what is "owed", See, *Craig v. Magee Mem. Rehabilitation Center,* 582 A.2d 1376 (Pa.Super. 1990), those Courts have never described the measure or scale upon which a defendant can objectively measure items of loss as arcane and subjective as "pain and suffering" or "loss of society" and the like.

Admittedly, if defendant knew the value of his obligation in advance of trial, the Court could legitimately require him to tender that amount. This cannot be said however in dealing with non-economic losses in personal injury claims. A clear example of the divergence in opinion on case value is presented in the facts of this case. For several years prior to the trial, Petitioner tendered sums from $35,000.00 to $46,000.00 (plus plaintiff's out-of-pocket expenses). App. pp. A29, 31, 33. Respondents

throughout that time claimed their cases were worth $250,000.00 App. p. 34. The jury thought the cases were worth $72,500.00. Was defendant below "wrong" in his evaluation, based on his knowledge of plaintiffs' claims? Were the plaintiffs below wrong in thinking that their claims were worth more than 350% of the jury's determination? Without the ability to objectively measure the "value" of claims such as these, concepts like "reasonable offer", *Laudenberger, supra,* and "tendering what is owed", *Craig, supra,* are essentially meaningless and serve as tacit admissions that Rule 238 lacks a rational foundation.

Doubtless, the drafters of Rule 238 would contend that the objective measure of the "reasonableness" of defendant's conduct is provided by the jury verdict. This however cannot be claimed to be a standard available to a defendant to guide his conduct unless the defendant can reasonably be presumed to know the jury verdict often years in advance of that body's empanelment.

The rule presumes that the defendant not only knows the objective value of the claims for pain and suffering, loss of consortium and the like but also knows, or can reasonably determine, often years before trial, how an unknown jury will appreciate the significance of the claim and adjudicate the numerous liability, causation and damage issues that are present in most contested matters. As the District Court for the Western District of Pennsylvania cogently explained, it is improper to use a jury award as a measure of the reasonableness of a defendant's pretrial offer as effective evaluation of a personal injury claim is a difficult and subjective process. *Rubright Company v. International Harvester Company,* 358 F.Supp. 1388 (1973)[13]. For

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13. In *Rubright,* the Court cogently stated: "Implicit . . . is the fact that evaluating a personal injury is a complex and imprecise process which the law delegates to the fact finders' subjective mental processes. When, by virtue of their group subjective analysis, jurors put a dollar value on a plaintiff's personal injuries, the court usually adopts that valuation as a form of absolute truth if it is within the bounds prescribed by damage principles. While we encourage parties to evaluate their cases for purposes of settlement, Courts cannot obligate a defendant to make an objective, advanced reading as to what damage figures the fact finder will produce after considering intangibles like loss of future earnings and pain and suffering. In the absence of an objective

these reasons this Honorable Court has ruled that jury verdicts cannot serve as the measure of the reasonableness of defendants settlement conduct, as we will discuss below.

Viewed another way, Rule 238 runs afoul of due process guarantees by establishing the jury award as the sole criterion of the reasonableness of defendant's conduct, while allowing defendant no opportunity to challenge this determination. This Court has consistently condemned the use of irrebuttable presumptions in due process decisions "when that presumption is not necessarily or universally true in fact". *Vlandis v. Kline,* 412 U.S. 441, 452, (1973) *see, Cleveland Board of Education v. LeFleur,* 414 U.S. 632, 664 (1974). While this Court has shown deference to the state's use of presumptions, when those presumptions in themselves express legitimate state interest, as in *Michael H v. Gerald D,* 491 U.S. 110, (1989) (where the court upheld the presumption of legitimacy of a child born to a married woman), this Court has consistently stricken statutes which use the irrebuttable presumption as a mere administrative shortcut and where some legitimate interest of the individual is thereby adversely affected. *See, Malmed v. Thornburgh,* 641 F.2d 565 (1980).

The present case is close to the situations presented in *Bell v. Burson,* 402 U.S. 513 (1971) and *Vlandis supra.* In *Bell,* this Court struck a Georgia statute requiring an uninsured driver to post bond equal to damages claimed as a result of an accident or suffer loss of driving privileges prior to trial. The Court found that the procedure presumed fault on the part of the driver and required a hearing take place on that issue before sanctions could be imposed. Although the Georgia Appellate Court ruled that "fault" played no part in the pretrial adjudicative process this Court stated "in reviewing state action in this area we look to substance not to bare form to determine whether constitutional minimums have been honored" *Id.* 402 U.S. at 541.[14]

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standard whereby a defendant himself can determine what he should pay plaintiff, the policy of *McGonnell* teaches that there can be no basis for finding a delay in making payment if the defendant chooses to use the trial process to establish the amount of plaintiff's damages." 358 F.Supp at 1395.

14. This Court also ruled that the Georgia legislature would have been within its rights to bar the issuance of licenses to all motorists who do not carry

Petitioner believes that an application of the rationales of *LeFleur, Vlandis* and *Bell* to the case at hand will result in a reversal of the Superior Court and condemnation of Rule 238, at least for the rule's failure to provide the defendant with some forum to contest the presumption of fault. Petitioner notes that while this Court in *Weinberger v. Salfi*, 422 U.S. 749 (1975), refused to apply the irrebuttable presumption test, that case appears to have been decided on the basis that the claimant had no "protected status" in his claim for widower's benefits under the Social Security Act. *Id.* at 2470. Similar results have been obtained in *Murgia*[15] and *Vance*[16] where age restrictions were held not violative under the "irrebuttable presumption doctrine". However, the doctrine has been applied post *Salfi* in *Toll v. Moreno*, 458 U.S. 1 (1982) where the doctrine was used to strike a Maryland statute which defined residency in such a manner so as to raise a conclusive presumption that G-4 aliens could not establish entitlement to state higher education benefits.

This case would provide this Court with an opportunity to clarify the extent to which the *LeFleur, Vlandis* and *Bell* line of cases expresses this Court's understanding of the requirements of the due process clause of the 14th Amendment as applied to administrative hearings and procedures.

(2) *Rule 238 is violative of the Equal Protection Clause of the 14th Amendment of the United States Constitution.*

The question for equal protection review under rational relation scrutiny is whether the classification as drawn between the classes of citizens is rationally related to the goal to be

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NOTES *(Continued)*

liability insurance or to those who did not post security, and that such a statute would not violate the 14th Amendment. "It does not follow however that the Amendment also permits the . . . scheme where not all motorists but only motorists involved in accidents are required to post security under penalty of loss of the license." *Bell v. Burson*, 402 U.S. at 540.

15. *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976) per curiam.

16. *Vance v. Bradley*, 440 U.S. 93 (1971).

obtained. *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439-40 313 (1985). Not only does the rule at issue draw a distinction between plaintiffs and defendants requiring the defendants to make reasonable settlement offers while imposing no similar duty or burden upon the plaintiff to act "reasonably" in making their settlement demands, more importantly, the rule draws an irrational distinction between defendants, punishing those whose offer does not meet an unknown and vacillating criterion and exonerating others even though their conduct may be identical.

One may consider two defendants (A and B) alike in means, station and degree of fault whose negligence has caused identical injuries to plaintiffs who are themselves alike in all regards. Both defendants offer the sum of $80,000.00 to their respective adversaries. Both offers are rejected and after a 5 year wait the cases are called to trial. If the jury award in A's case amounts to $100,000.00, defendant A will be exonerated from payment of delay damages. If the jury in defendant B's case awards one cent more than A's jury, B will pay additional damages of approximately $50,000.00 depending upon the prevailing interest rate, although B's conduct was identical to that of A.

2. *The Pennsylvania Superior Court's affirmance of the constitutionality of Rule 238 is in conflict with the settled precedent of this Court.*

In an earlier era, this Court reviewed numerous state statutes which required civil defendants, primarily insurance carriers and common carriers, to promptly adjust and settle property damage claims filed against them. Typically, if the penalty imposed by the statute was moderate and if the statute required that the plaintiff prove the legitimacy of his claim at trial, the statutes were upheld.[17]

However, this Court has refused to accept as a reasonable exercise of state power statutes which imposed penalties or additional damages upon defendants for failure to settle claims

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17. See, e. g., *Kansas City S. R. Co. v. Anderson*, 233 U.S. 325 (1914); *Yazoo and Mississippi V.R.R. v. Jackson Vinegar Company*, 226 U.S. 217 (1912); *Seaboard Air Line R.R. v. Seegers*, 207 U.S. 73 (1907).

where the damages were not liquidated or otherwise subject to easy and objective calculation. While the decisions were expressed in the judicial language of that time, the rationale for the decisions has never been renounced by this Court and remains valid.

In *Seaboard Airline R.R. v. Seegers,* 207 U.S. 73 (1907) this Court heard a constitutional challenge to a South Carolina statute which required common carriers to adjust freight losses within 40 days at risk of penalty of $50.00 *provided that* the plaintiff recovered by verdict the full amount sued for. The Court upheld the statute on the grounds that it was fair to require the defendant to promptly settle the claim as the means for doing so were peculiarly within the power of the carrier. As the Court, per Mr. Justice Brewer reasoned:

> Further, the matter to be adjusted is one peculiarly within the knowledge of the carrier. It receives the goods and has them in its custody until the carriage is completed. It knows what is received and what is delivered . . . the carrier can determine the amount of the loss more accurately and promptly and with less delay and expense than anyone else.

207 U.S. at 78[18] Seven years later this Court received the opportunity to decide the question unanswered in *Seegers:* can defendant be penalized for failure to settle where he does not know the value of plaintiff's claim?

In *Chicago N&St. P. Ry, v. Polt,* 232 U.S. 165 (1914) the Court addressed a statute requiring carriers to tender full damages to all parties suffering loss as a result of fires communicated by locomotives. The statute penalized the railroad by imposing double damages for failure to pay the claim within 60

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18. It is noteworthy that the Court in *Seegers* focused on the relative ability of the claimant and carrier to adjust the property damage sustained during carriage. Compare the strength of the carrier's position to evaluate the loss in *Seegers* with the defendant's ability in a personal injury claim to evaluate losses where the principle items may be subjective "pain and suffering" or loss of consortium. Upon what scale may defendant hang those items to measure their weight and worth?

days but forgave the penalty if the plaintiff rejected the offer and failed to recover the demanded amount at trial. Speaking for the Court was Mr. Justice Holmes:

> No doubt the states have a large latitude in the policy that they will pursue and enforce, but the rudiments of fair play required by the 14th Amendment are wanting when a defendant is required to guess rightly what a jury will find or pay double if that body sees fit to add one cent to the amount that was tendered, although the tender was obviously futile because of an excessive demand.

Id. at 168.[19]

The "Rule" of *Polt* was further clarified by this Court in *Chicago N.W. Ry. v. Nye-Schneider, Fowler Company,* 260 U.S. 35 (1922) (per Mr. Justice Taft). Passing on the constitutionality of a Nebraska statute attaching attorney fees to a verdict, this Court analyzed the type of statutory measure prohibited by the *Polt* rule and agreed that "A company cannot be subjected to a penalty for not guessing rightly at the verdict of a jury." 260 U.S. at 45.

The Court then distinguished the statutes requiring adjustment of freight loss claims from those requiring adjustment to losses of property which were not in the possession or control of the defendant.

> [In *Polt*] the extent of damage was not peculiarly within the company's knowledge. Here, the damages were for hogs injured during the custody of the carrier and whose value was determined by weight and market price and not difficult to ascertain after a bona fide effort and there was no effort to tender at all.

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19. While Mr. Justice Holmes' reliance on the "fundamental fairness" doctrine may be questioned by some as an example of *Lochnerism,* as demonstrated previously Rule 238 is unconstitutional under any modern means of analysis. Further, Justice Holmes career is marked by the avoidance of judicial activism of this period. *See, Lochner v. New York,* 198 U. S. 45, 65 (905) (Holmes, J., dissenting); *Adair v. United States,* 208 U.S. 161 (1908) (Holmes, J., dissenting); *see also,* Rehnquist, The Supreme Court p. 206-212 (Monroe & Co., 1987)

Id. 43 U.S. at 45.

This Court has therefore established the rule by which statutes are to be measured for constitutionality under the 14th Amendment Due Process Clause when the state seeks to add penalties or damages to a jury award for a defendant's failure to settle a claim prior to trial. If the value of the items of loss are peculiarly within the knowledge of the defendant or may be calculated with little difficulty by use of some objective criteria, the state is within its power to add penalties if they are reasonable.[20] But where a defendant, in order to save himself from penalties, must guess rightly at an award of an unknown jury in a nonliquidated damage claim, or where damages are difficult to ascertain, or (as in this case) solely within the subjective determination process of the jury, imposition of penalties or additional damages will not be permitted.[21]

3. *Rule 238 conflicts with this Court's decisions restricting the rights of states to impose penalties upon unsuccessful litigants where those penalties are "unreasonable".*

Finally, the issues in this case present this Court an opportunity to expand upon and clarify its decisions regarding the extent to which states may penalize unsuccessful litigants for their use of the trial or appeals process to protect their legitimate property interests. While we have seen that this Court has stricken state statutes which require a defendant to accurately predict the amount of a jury verdict and tender that amount or be held liable for additional damages, or penalties, *Polt, supra*, this Court has also given considerable attention to the amount of the penalty that may be exacted when it has found that the litigant's conduct was less than reasonable. *Yazoo & Mississippi Valley Railroad v. Jackson Vinegar Company,* 226 U.S. 217 (1912) ($25.00 penalty on claims not paid within 60 days found reasonable where the plaintiff's demand was not excessive and the defendant had ability to assess validity of claim promptly);

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20. *Chicago N.W. Ry. v. Nye-Schneider, Fowler Co.,* 260 U.S. 35 (1922); *Seaboard Airline R.R. v. Seegers,* 207 U.S. 73 (1907).

21. *Chicago N.W. Ry. v. Nye-Schneider, Fowler Co., supra.*; *Chicago N. & St. P. Ry. v. Polt,* 332 U.S. 165 (1914).

Chicago & N.W. Ry. v. Nye-Schneider, Fowler Co., 260 U.S. 35 (1922) (upholding statute requiring payment of a "reasonable attorney fee" where defendant capable of promptly and accurately assessing value of plaintiff's claim with no effort to tender settlement). *Life & Casualty Ins. Co. of Tennessee v. McCray*, 291 U.S. 566 (1934) (approved statute imposing 12% interest and attorney fee for collection of proceeds of life insurance company policy where amount of claim was liquidated). (Four justices dissenting as the amount of penalty (12%) was thought to be excessive).

This Court has recently had the opportunity to revisit this area in *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71 (1988) where it considered an equal protection claim by a carrier required to pay an additional 15% of the judgement for an unsuccessful appeal. While upholding the 15% penalty, this Court indicated that there are limits to the amount of penalties that can be imposed and that such statutes are subject to equal protection analysis. *Bankers Life*, 486 U.S. 82, 83; *Lindsey v. Normet*, 405 U.S. 56, 78 (1972) (where this Court struck a state statute requiring the posting of a bond equal to double the verdict amount on an appeal from a landlord tenant court determination).

Thus, while this Court has found certain penalty statutes to be "reasonable" and within the state's legitimate interests, it is clearly indicated that there are limits to this right. Petitioner would assert that a rule requiring payment of delay damages amounting to 50% of a jury verdict would fall outside of the constitutional limit of the state's legitimate interest.

CONCLUSION

For the foregoing reasons Petitioner respectfully requests that this Court issue a Writ of Certiorari to the Superior Court of Pennsylvania.

Respectfully submitted,

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(215) 299-3000

APPENDIX

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

JOHN A. LUPARELLI, Administrator of the Estate of Richard R. Luparelli, Deceased	:	No. 515 E.D. Allocatur Docket, 1992
Petitioner	:	
v.	:	
CARLETTA J. SOHN and JONG SOO SOHN,	:	Petition for Allowance of Appeal From The Superior Court
Respondents	:	

ORDER

PER CURIAM:

AND NOW, this 18th day of MAY, 1993 the Petition for Allowance of Appeal is DENIED.

A TRUE COPY FROM RECORD
Attest: 5/18/93

/s/ William G. Corey
William G. Corey, Esquire
Deputy Prothonotary, Supreme Court of
Pennsylvania, Eastern District

ORDER OF THE SUPERIOR COURT OF PENNSYLVANIA

CARLETTA SOHN & JONG SOO SOHN

v.

JOHN LUPARELLI, ADMINISTRATOR
OF THE ESTATE OF
RICHARD LUPARELLI, DEC'D.,
APPELLANT

NOS. 2061, 2062 & 2063
PHILADELPHIA, 1991

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of PHILADELPHIA County be, and the same is hereby AFFIRMED.

BY THE COURT:

/s/ David A. Szewczak
PROTHONOTARY

Dated: JULY 16, 1992

MEMORANDUM OPINION OF THE SUPERIOR COURT PANEL

CARLETTA J. SOHN AND JONG SOO SOHN, *Appellees*	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JOHN LUPARELLI, ADMINISTRATOR OF THE ESTATE OF RICHARD R. LUPARELLI, DECEASED, *Appellant*	:	No. 2061 Philadelphia 1991

Appeal From the Judgment Entered August 8, 1991
Docketed June 24, 1991
In the Court of Common Pleas, Civil Division,
Philadelphia County, No. JULY TERM, 1986 4419

CARLETTA J. SOHN AND JONG SOO SOHN, *Appellees*	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JOHN LUPARELLI, ADMINISTRATOR OF THE ESTATE OF RICHARD R. LUPARELLI, DECEASED, *Appellant*	:	No. 2062 Philadelphia 1991

Appeal From the Judgment Entered August 8, 1991
Docketed June 11, 1991
In the Court of Common Pleas, Civil Division,
Philadelphia County, No. 4419 JULY TERM, 1986

CARLETTA J. SOHN AND JONG SOO SOHN, *Appellees*	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JOHN LUPARELLI, ADMINISTRATOR OF THE ESTATE OF RICHARD R. LUPARELLI, DECEASED, *Appellant*	:	No. 2063 Philadelphia 1991

Appeal From the Judgment Entered August 8, 1991
Docketed June 3, 1991
In the Court of Common Pleas, Civil Division,
Philadelphia County, No. 4419 JULY TERM, 1986

BEFORE: CAVANAUGH, OLSZEWSKI and BECK, JJ.

MEMORANDUM:

These are appeals from three orders entered by the Court of Common Pleas of Philadelphia County following a jury verdict for appellees, Carletta J. Sohn and Jong Soo Sohn, in a personal injury action.[1] Appellant, John Luparelli, administrator of the estate of Richard R. Luparelli, deceased, appeals from the orders which molded the verdict against him to include delay damages and denied a petition for reconsideration. We affirm.

On July 28, 1986, appellees filed a complaint against Richard Luparelli seeking to recover for personal injuries they sustained in an automobile accident on February 25, 1985.

On June 10, 1988, appellant made the first of three written settlement offers to appellees. In his first offer, appellant offered $35,000, which appellees rejected on June 27, 1988 and demanded $250,000. On July 14, 1988, appellant offered $46,000, which appellees rejected on July 27, 1988.

On August 6, 1988, original defendant Richard R. Luparelli died. No administrator was substituted as the defendant of record until the day trial commenced over two and one half years after Richard R. Luparelli's death.

On November 10, 1989, appellant made a third offer, augmenting the second offer of $46,000 with plaintiff's out-of-pocket expenses. Appellees rejected this offer on November 27, 1989 and continued to demand $250,000.[2] Correspondence following a telephone conversation on April 26, 1990 between appellees' counsel and a claims negotiator representing appellant's insurance carrier, shows that the claims negotiator was not aware of appellant's third offer of "$46,000.00 plus the out of pocket *medical* expenses." (emphasis added). The letter from appellees' counsel to the claims negotiator shows that counsel believed appellant's third offer amounted to $86,000.

On March 15, 1991, the parties met for a pretrial conference before the Honorable Leon Katz. During that conference,

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1. One order simply corrected a typographical error in a previous order which calculated delay damages.

2. Appellees' rejection of the third offer is referred to in a letter dated April 26, 1990 from appellees' counsel to an a claims negotiator representing appellant's insurance carrier.

counsel and the court referred to a settlement conference held one month earlier before another judge who had recommended a $100,000 settlement. Counsel for appellant's insurance carrier indicated that although the carrier had not yet decided whether to make an offer of $100,000, it was her belief that such an offer was unlikely. Appellees' counsel then indicated his clients would accept an offer of $100,000. The conference concluded with Judge Katz requesting appellant's counsel to resubmit the $100,000 settlement offer to the insurance carrier, noting appellees' willingness to accept that amount. Appellant's counsel stated that the carrier should be able to make a decision within two weeks. The record discloses no further action on the pretrial conference negotiations.

On April 15, 1991, trial commenced and the jury returned a verdict in favor of appellees on April 18, 1991 in the amount of $64,250 for Carletta Sohn and $8,250 for Jong Soo Sohn, for a total verdict of $72,500. Appellees then filed a motion for delay damages, requesting interest from that date the complaint was filed until the date the jury returned the verdict. The court granted delay damages for the full period requested in the amount of $31,477.67 for Carletta Sohn and $4,041.88 for Jong Soo Sohn, for a total amount of delay damages of $35,519.55. The total verdict with delay damages amounted to $108,019.55. Appellant filed a petition for reconsideration, which the trial court denied. Appellant now appeals. We affirm.

On appeal, appellant argues that the delay damages rule, Pa.R.C.P. 238 is unconstitutional for several reasons: (1) the rule violates the Due Process Clauses of the United States and Pennsylvania Constitutions; (2) the rule violates the Equal Protection Clauses of the United States and Pennsylvania Constitutions; (3) the rule violates the Pennsylvania Constitution because it abridges the substantive rights of defendants and enlarges those of plaintiffs; and (4) the rule is unconstitutional because it unduly inhibits defendants from exercising their fundamental right to resort to the courts in defense of claims made against them.

Alternatively, appellant argues that if this Court finds Rule 238 constitutional, the lower court abused its discretion by failing to conduct a hearing to determine whether appellant's

offer on November 10, 1989 of $46,000 plus out-of-pocket expenses satisfied the written offer requirement of the rule thereby tolling appellant's obligation to pay delay damages after that date.

As an initial matter, appellees raise the issue of appellant's noncompliance with Pa.R.App.Proc. 522, requiring notice to the Court Administrator of Pennsylvania of a challenge to the constitutionality of a rule. Appellant states in his reply brief that notice was given to the Court Administrator after the entire record had been submitted to this Court. Although appellant's compliance with Rule 522 was untimely, we will consider appellant's appeal. *See Gross v. Johns-Manville Corp.*, ____ Pa. Super. ____, ____, 600 A.2d 558, 567n.13 (1991). *See also Lilley v. Johns-Manville Corp.*, 408 Pa. Super. 83, 101-02, 596 A.2d 203, 212 (1991) (noncompliance with Rule 522 waived issue but were court to address constitutionality arguments concerning Rule 238, court would find them to be meritless).

The constitutional arguments raised by appellant have been repeatedly examined and rejected by our Supreme Court. *See Schrock v. Albert Einstein Medical Center*, 527 Pa. 191, 589 A.2d 1103 (1991); *Craig v. Magee Memorial Rehab. Center*, 512 Pa. 60, 515 A.2d 1350 (1986) and its progeny. *See also Gross* at ____, 600 A.2d at 567; *Bailey v. Pennsylvania Elec. Co.*, ____ Pa. Super. ____, ____, 598 A.2d 41, 51-52 (1991); *Lilley* at 101-03, 596 A.2d at 212-13; *Craig v. Magee Memorial Rehab. Center*, 400 Pa. Super. 126, 582 A.2d 1376 (1990); *Dietrich v. J.I. Case Co.*, 390 Pa. Super. 475, 486-91, 568 A-2d 1272, 1277-80 (1990) *appeal denied* ____ Pa. ____, 596 A.2d 157 (1991); and *Shellhamer v. Grey*, 390 Pa. Super. 122, 129, 568 A.2d 224, 228 (1989) (Equal Protection challenge). Unless or until the law changes we are bound by the pronouncements of our Supreme Court. Accordingly, we find no merit to appellant's constitutional challenges to Rule 238.

We now turn to appellant's argument that the court abused its discretion by failing to conduct a hearing to determine whether the offer of $46,000 plus out-of-pocket expenses constituted a "specified sum" under Rule 238(b)(1), thereby cutting off appellant's duty to pay delay damages from the date of that offer. Appellant contends that the offer satisfied the requirement

of "a written offer of settlement in a specified sum" because the offer was made after discovery had been completed and both parties knew the exact amount of appellees' out-of-pocket expenses. Pa.R.C.P. 238(b)(1)(i). In support of this position, appellant points to the statement by appellees' counsel in his April 26, 1990 letter to the claims negotiator, that he believed the third offer amounted to $86,000. Thus, appellant claims that the offer of November 10, 1989 was an offer of $86,000, and qualified as a specified sum under the rule.

The trial court concluded that the offer did not qualify as a specified sum under the rule and declined to hold a hearing on the issue. We agree with the trial court that appellant's offer of $46,000 plus out-of-pocket expenses was not in conformity with the rule. By requiring a "specified sum," the rule contemplates a statement in dollars and cents. Appellant's offer does not qualify. The correspondence between appellees' counsel and the claims negotiator counteracts that there was a meeting of the minds. The claims negotiator was not aware of appellant's offer until six months after it was made and her letter shows that she thought the offer involved out-of-pocket *medical* expenses.

Instantly, the out-of-pocket expenses could have easily been ascertained. We are bound, however, by the clear meaning of the rule, even though its application under these circumstances may seem unfair. Accordingly, we hold that the trial court acted within its discretion by declining to grant a hearing on this issue.

Orders entering judgment affirmed.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

CARLETTA J. SOHN and JONG SOO SOHN, *Plaintiffs*	:	JULY TERM, 1986
v.	:	
JOHN LUPARELLI, Administrator of the Estate of Richard R. Luparelli, deceased, *Defendants*	:	NO. 4419

ORDER

AND NOW, this 28th day of May, 1991, upon consideration of Plaintiffs' Motion for Delay Damages and Defendant's response thereto, it is hereby

ORDERED and DECREED that the Motion is GRANTED pursuant to Pennsylvania Rule of Civil Procedure 238.

It is further ORDERED that the verdict in favor of the plaintiff, Carletta J. Sohn, in the amount of Sixty Two Thousand, Five Hundred Dollars ($62,500) is hereby molded to reflect the addition of delay damages in the amount of Thirty One Thousand, Four Hundred Seventy Seven Dollars, Sixty Seven Cents ($31,477.67) for a total verdict of Ninety Three Thousand, Nine Hundred Seventy Seven Dollars, Sixty Seven Cents ($93,977.67).

It is further ORDERED that the verdict in favor of the plaintiff, Jong Soo Sohn, in the amount of Eight Thousand, Two Hundred Fifty Dollars ($8,250) is hereby molded to reflect the addition of delay damages in the amount of Four Thousand, Forty One Dollars, Eighty Eight Cents ($4,041.88) for a total verdict of Twelve Thousand, Two Hundred Ninety One Dollars, Eighty Eight Cents ($12,291.88).

/s/ Katz

J.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

CARLETTA J. SOHN and JONG SOO SOHN, *Plaintiffs*	:	JULY TERM, 1986
v.	:	
JOHN LUPARELLI, Administrator of the Estate of Richard R. Luparelli, deceased, *Defendants*	:	NO. 4419

ORDER

AND NOW, this 30th day of May, 1991, it is hereby ORDERED and DECREED that this Court's Order, dated May 28, 1991, granting plaintiffs' motion for delay damages and molding the jury's verdict to reflect such damages, is amended to read as follows:

It is hereby ORDERED and DECREED that the Plaintiff's Motion for Delay Damages is GRANTED pursuant to Pennsylvania Rule of Civil Procedure 238.

It is further ORDERED that the verdict in favor of the plaintiff, Carletta J. Sohn, in the amount of Sixty Four Thousand, Two Hundred Fifty Dollars ($64,250) is hereby molded to reflect the addition of delay damages in the amount of Thirty One Thousand, Four Hundred Seventy Seven Dollars, Sixty Seven Cents ($31,477.67) for a total verdict of Ninety Five Thousand, Seven Hundred Twenty Seven Dollars, Sixty Seven Cents ($95,727.67).

It is further ORDERED that the verdict in favor of the plaintiff, Jong Soo Sohn, in the amount of Eight Thousand, Hundred Fifty Dollars ($8,250) is hereby molded to reflect the addition of delay damages in the amount of Four Thousand, Forty One Dollars, Eighty Eight Cents ($4,041.88) for a total verdict of Twelve Thousand, Two Hundred Ninety One Dollars, Eighty Eight Cents ($12,291.88).

/s/ Katz

J.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

CARLETTA J. SOHN and JONG SOO SOHN, *Plaintiffs*	:	JULY TERM, 1986
v.	:	
JOHN LUPARELLI, Administrator of the Estate of Richard R. Luparelli, deceased, *Defendants*	:	NO. 4419

ORDER

AND NOW, this 18th day of June, 1991, upon consideration of Defendant's Petition for Reconsideration, it is hereby ORDERED and DECREED that the Petition is DENIED.

/s/ Katz

J.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

CARLETTA J. SOHN and JONG SOO SOHN,	:	
Plaintiffs	:	JULY TERM, 1986
v.	:	
JOHN LUPARELLI, Administrator of the Estate of Richard R. Luparelli, deceased,	:	
Defendant	:	NO. 4419

OPINION

By: Katz, J.

This Opinion is in support of the Orders dated May 28, 1991 and May 30, 1991, granting plaintiffs' Motion for Delay Damages, and the Order dated June 18, 1991, denying defendant's Petition for Reconsideration.

Background

This case arose as a result of an automobile accident between two vehicles driven by Jong Soo Sohn and Richard Luparelli on February 25, 1985. Mr. Sohn and his wife, Carletta, a passenger in the vehicle, both sustained personal injuries.

Suit was instituted by way of complaint on July 28, 1986. The case was tried before a jury, commencing on April 15, 1991. On April 18, 1991, the jury returned a verdict in favor of the plaintiffs and against the defendant, awarding an aggregate sum of $72,500.

Richard R. Luparelli, now deceased, originally had retained J. Vincent Roche as counsel in this matter. Discovery commenced promptly, and by July 10, 1987, plaintiffs had filed answers to defendant's interrogatories. In those answers plaintiffs claimed that, due to the accident with Luparelli, Carletta

Sohn, alone, had sustained bills and lost wages, not covered by insurance, totalling $14,281.[1]

Following this discovery and prior to trial in this matter, the defense made three written offers to the plaintiffs: (1) by letter dated June 10, 1988, the defense tendered "the sum of $35,000 to Plaintiffs in full and complete settlement of their claims," Plaintiffs' Motion for Delay Damages (hereinafter referred to as "Plaintiffs' Motion"), Exhibit A; (2) by letter dated July 14, 1988, Mr. Roche "augment[ed] Defendant's offer to $46,000," Plaintiffs' Motion, Exhibit B; and (3) by letter dated November 10, 1989, Mr. Roche wrote: "In reviewing my file, I note that a prior offer of $46,000 was tendered to but rejected by Plaintiffs. Defendant hereby augments that amount by Plaintiffs' out-of-pocket expenses. Upon word from you, I will draft and submit the condign closing instrument." Plaintiffs' Motion, Exhibit C. All three offers were rejected by the plaintiffs, who demanded $250,000.

On April 26, 1990, Plaintiffs' counsel, George O'Neill had a conversation on the phone with Nancy McKittrick, a claims negotiator from the defense's insurance carrier.[2] McKittrick informed him that she was not aware that the final offer had been made. Following the conversation, both individuals exchanged correspondence. In McKittrick's letter, dated the day of the conversation, she recorded that O'Neill had informed her that the plaintiffs had been offered "$46,000.00 plus the out of pocket *medical* expenses." Plaintiffs' Motion, Exhibit D. In O'Neill's correspondence, dated the same day, he set forth that he believed that the earlier offer "amounted to $86,000.00, on

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1. Carletta Sohn's itemized bills and wage loss, at a conservative figure, amounted to at least $29,281. Defendant's Petition for Reconsideration (hereinafter referred to as "Defendant's Petition"), Exhibits A, B, and C(48)". However, $10,000 of the medical bills and $5,000 of the lost wages were covered by the plaintiff's health insurer. Defendant's Petition, Exhibit C(17)(e).

2. Although J. Vincent Roche did not officially withdraw as counsel for the defense until May 4, 1990, he apparently had terminated performing services for the defense prior to the April 26, 1990 conversation.

November 27, 1989." Defendant's Answer to Motion for Delay Damages (hereinafter referred to as "Defendant's Answer"), Exhibit A.

On August 6, 1988, original defendant Richard Luparelli died. Nevertheless, no administrator was named for the estate until the eve of trial in April, 1991, when decedent's father, John A. Luparelli was appointed. Not until trial in this matter commenced on April 15, 1991, was John Luparelli, as Administrator of the Estate of Richard Luparelli, deceased, substituted as the defendant of record.

Promptly following the jury verdict, plaintiffs filed a Motion for Delay Damages on the combined $72,500 verdict, seeking interest from July 28, 1986 (when complaint was filed) until April 18, 1991 (when verdict was rendered). In an Order dated May 28, 1991, plaintiffs' motion was granted and delay damages awarded for the full period requested. An Amended Order was filed on May 30, 1991 to simply correct a typographical error with regard to the amount of the jury verdict in favor of plaintiff, Carletta Sohn. In response to this Order, defendant filed a Petition for Reconsideration, which was denied in an Order dated June 18, 1991.

Defendant timely appealed from these Orders. This Opinion addresses the five arguments that defendant made against the awarding of full delay damages.

Legal Argument

Pennsylvania Rule of Civil Procedure 238, made effective on November 7, 1988, sets forth, in relevant part:

> (a) (1) At the request of the plaintiff . . . damages for delay shall be added to the amount of compensatory damages awarded . . . in the verdict of a jury.
>
> (2) Damages for delay should be awarded for the period of time
>
> (i) in an action commenced before August 1, 1989, from the date the plaintiff first filed a complaint or from a date one year after the accrual of the cause of action, whichever is later, up to the date of the award, verdict or decision; or
>
> (ii) in an action commenced on or after August 1, 1989, from a date one year after the date original process was

first served in the action up to the date of the award, verdict or decision.

(b) The period of time for which damages for delay shall be calculated under subdivision (a) (2) shall exclude the period of time, if any,

(1) after which the defendant has made a written offer of . . . settlement in a specified sum with prompt cash payment to the plaintiff . . ., which offer was not accepted and the plaintiff did not recover . . . more than 125 percent of . . . the specified sum . . .; or

(2) during which the plaintiff caused delay of the trial.

(c) . . . (1) . . . If an issue of fact is raised, the court may, in its discretion, hold a hearing before entering an appropriate order.

1. *Unconstitutionality*

Defendant first argued that no delay damages should be awarded because Pennsylvania Rule of Civil Procedure 238 is violative of the Pennsylvania and the United States Constitution.

In 1986, the Supreme Court of Pennsylvania suspended the mandatory provisions of the former Rule 238 governing delay damages without specifically stating the precise constitutional grounds. *Craig v. Magee Memorial-Rehabilitation Center,* 512 Pa. 60, 515 A.2d 1350 (1986). The present Rule 238 was promulgated to effectuate the *Craig* decision.

The Superior Court of Pennsylvania has reviewed the constitutionality of the present Rule 238 and has concluded that: "Rule 238 is not patently unconstitutional, and any further determination in this respect can only emanate from the Supreme Court." *Dietrich v. J. I. Case Co.,* 390 Pa.Super. 475, 490, 568 A.2d 1272, 1279 (1990).

The Pennsylvania Supreme Court has not made any decisions regarding the constitutionality of the present Rule 238. The court did apply the Rule, however, in a recent decision, where it found that a trial court had not committed an error when it assessed delay damages against a hospital defendant that

was not at fault for causing the delay of the trial.[3] *See Schrock v. Albert Einstein Medical Center*, __ Pa. __ , 589 A.2d 1103 (1991).

In lieu of the Superior Court's pronouncement that the Rule is constitutional; and in lieu of the Supreme Court's application of the Rule and failure, as of yet, to find it unconstitutional, it was proper not to deny delay damages based upon defendant's constitutional argument.

2. *Defendant's Lack of Fault*

Defendant further argued that no delay damages should be awarded because defendant consistently attempted resolution of this case with good faith efforts, and the parties' failure to settle was caused solely by plaintiffs' recalcitrance.

The Pennsylvania Supreme Court, however, has determined that defendant's fault, or lack thereof, is irrelevant in applying Rule 238. Although Rule 238 does not allow delay damages when any delay is caused by a plaintiff, Pa.R.C.P. 238(b) (2), the rule does not require that a defendant have been the cause of any delay. *See Schrock*, __ Pa. at __ , 589 A.2d at 1106-07. In *Schrock*, the Supreme Court stated "it is irrelevant whether that defendant subsequently delays the progress of the litigation when the trial court assesses delay damages." *Id.* at __ , 589 A.2d at 1107. Therefore, it was proper not to withhold delay damages based solely on the alleged recalcitrance on the part of the plaintiffs.

3. *Delay Damages Against Administrator of the Defendant's Estate*

Defendant's third argument was that no delay damages should be awarded against the defendant, John A. Luparelli, Administrator of the Estate of Richard R. Luparelli, deceased, because he was a non-participant throughout all but three days of the period in which delay damages are claimed to have accrued. Defendant claimed that plaintiffs' attorney was notified immediately of the death, and yet failed to file for appointment

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3. The Court found that the defendant had waived its constitutional challenge by not raising the issue at the trial court level. *Schrock v. Albert Einstein Medical Center*, __ Pa. __ , __ , 589 A.2d 1103, 1104 n.1 (1991).

of an administrator. During the period of time in which the estate was unrepresented, defendant argued, there was technically no defendant, based upon an assertion that suits against dead men are nullities. Defendant concluded that the estate should not be penalized with delay damages during the period of time when there was, in his mind, no defendant to the law suit.

This argument failed on the law and on the facts. Although a suit may not be brought against a dead man, all causes of action survive the death of the defendant if suit was instituted, as occurred in the present matter, before the defendant's death. 20 Pa.C.S.A. §3371; 42 Pa.C.S.A. §8302. Furthermore, Pennsylvania Rule of Civil Procedure 2354, which addresses the status of a successor (an individual who has succeeded to the interest of a party to an action), holds that "[i]f the successor voluntarily becomes a party to the action . . . he shall have all the rights and liabilities of a party to the action." Pa.R.C.P. 2354. Therefore, when Richard Luparelli died, this action survived and his estate was responsible for any of his legal liabilities. When John Luparelli voluntarily assumed the role of administrator of his son's estate and, in his capacity as administrator, succeeded to his son's interests as a matter of law, he took on the litigation liabilities of the estate, which included delay damages.

From a factual standpoint, there was no discontinuation of representation by defense counsel following Richard Luparelli's death. On November 10, 1989 (over a year after Richard Luparelli's death, and over a year before trial commenced) defense counsel made a written offer to the plaintiffs. On April 26, 1990 (a year before trial) a letter was sent from defendant's insurance company to plaintiffs' attorney discussing the status of negotiations. Defense counsel, Richard Hohn, filed an Entry of Appearance on behalf of the defense in May, 1990, and a Praecipe for Suggestion of Death in November, 1990.

Therefore, based upon the law, which demonstrates that there is a transference of liability to parties' successors, and based upon the facts, which indicate that there was representation of the defendant party following Richard Luparelli's death, delay damages were properly imposed against John Luparelli, in spite of his late substitution.

4. *First Year After Complaint*

Defendant further argued that delay damages, if imposed at all, should not be imposed for the first year after the complaint was filed, even though Rule 238(a) specifically allows for interest during this time period for actions, such as this action, that commenced *before* August 1, 1989. Defendant pointed out, then concluded, that Rule 238 does not allow for first year interest for actions commencing *after* August 1, 1989; and "as there is no reasonable basis for the disparate treatment of these two classes, the Rule fails to pass constitutional muster and must be stricken as a violation of the rights to equal protection under the laws guaranteed by the Pennsylvania and United States Constitutions." Defendant's Memorandum of Law in Support of Defendant's New Matter.

The Explanatory Comment that followed the promulgation of the present Rule 238 addressed the disparate treatment: "In order to prevent unfairness to parties who may have delayed filing the initial complaint in reliance upon the former provision, subdivision (a) (2) (ii) of the amended rule will become effective one year later than the remainder of the provisions." Pa.R.C.P. 238, Explanatory Comment, 1988. This provides the reasonable basis for disparity that defendant overlooked. Furthermore, as noted above, the Superior Court has found that the Rule is constitutionally valid.

Therefore, in accordance with Rule 238 (a) (2) (i) , it was proper to impose delay damages beginning on July 28, 1986, when the complaint was filed.

5. *Specified Sum*

Finally, defendant argued that delay damages, if imposed at all, should not be imposed for the period of time following November 10, 1989, when defendant offered, in writing, $46,000 plus "the amount of Plaintiffs' out-of-pocket expenses."

As set forth more completely above, Rule 238(b)(1) ends the imposition of delay damage interest on the date, if any, when defendant has made a written offer of settlement in a "specified sum" to plaintiff that amounted to at least 80% of the eventual recovery. In the present matter, 80% of the total jury verdict of

$72,500 amounts to $58,000. Defendant asserted that the November 10, 1989 offer ($46,000 plus "out-of-pocket expenses") exceeded this $58,000 plateau, and that both parties understood that to be true, based upon plaintiffs' responses to Interrogatories and the correspondence between the parties.[4] Plaintiffs argued, however, that such offer was not for a "specified sum," as mandated by Rule 238(b) (1) (i), and, therefore, did not bar further imposition of delay damages.

There is no statutory definition of "specified sum," and, likewise, no case law on this issue. Therefore, the words should be construed "according to their common and approved usage. Pa.R.C.P. 103 (a) The word "specified," is the past tense of specify, which means "to name or state explicitly or in detail." Webster's New Collegiate Dictionary 1108 (1980) "Specify" has also been defined as "to state in full and explicit terms; to point out; to tell or state precisely or in detail; to particularize, or to distinguish by words one thing from another." Black's Law Dictionary 1255 (5th ed. 1979).

The explicit and precise nature of such an offer is very important to Rule 238, because it is against this "specified sum" that the eventual recovery is judged by the courts. The very inclusion of the word "specified" should negate a need for later inquiries by a court to determine an amount offered. The requirement in the same sentence of Rule 238, that the offer be a "written offer," demonstrates the Supreme Court's desire to avoid such separate litigation as to the existence and sufficiency of any offer.[5]

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4. Throughout his motions, defendant placed great importance on the fact that George O'Neill, plaintiffs' counsel, had informed Nancy McKittrick, an employee of the defense's insurer that O'Neill believed the November 10, 1989 offer amounted to an offer for $86,000. Such importance is misplaced. O'Neill's estimation was made in the context of a discussion with a claims negotiator who recently had entered the fray of settlement negotiations on behalf of the defense. His desire to begin negotiations anew at the highest possible settlement level is apparent, and should forestall the placement of great significance on such estimation.

5. This Court is fully aware that Rule 238 permits a hearing to determine issues of fact. Pa.R.C.P. 238(c) (1). Nevertheless, the Supreme Court of Pennsylvania added the discretionary hearing option to "resolve issues of fact in the determination of fault," Pa.R.C.P. 238, Explanatory Comment (1988),

Furthermore, if "specified sum" were read loosely to require a court to inquire into the actual sum of $46,000 plus "out-of-pocket expenses," such a required reading would contradict one of Rule 238's enumerated purposes: "to alleviate delay, in the courts." *See* Pa.R.C.P. 238, Explanatory Comment (1988). First, few, if any, plaintiffs will accept an offer unless certain of the exact amount being offered, and, therefore, such a liberal interpretation does not promote settlements in any way. Secondly, supplemental judicial inquiries into the values of ambiguous offers only add more litigation to the court system and delay other cases awaiting trial.

There is an additional reason for the "specific sum" wording to be read strictly. If required to interpret ambiguous offers following jury verdicts, courts will have to base such interpretations on an inherently unfair arbitrary standard, choosing either party's viewpoint at the expense of the other. For example, assume that the proper standard were to look to the plaintiff's view of the amount of an offer. Under such standard, assume further that an ambiguous offer was made by defendant who meant such offer to equal $90,000, while the plaintiff believed such offer to only amount to $70,000. When a verdict of $100,000 is awarded, the ambiguous offer will be judged from plaintiff's view, and found to have been below 80% of the verdict and too low to forestall further delay damages. The defense will be harmed by having to pay delay damages even though they offered an amount that they believed to be, and which proved to be, an adequate offer. Equal harm often would come to plaintiffs if defendants' views of offers were used as the proper standard. For example, using the assumed facts set forth above, plaintiff

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NOTES *(Continued)*

and thereby avoid Due Process violations. *See Craig v. Magee Memorial Rehabilitation Center,* 512 Pa. 60, 66, 515 A.2d 1350, 1353 (1986) (suspending prior delay damage rule due in part to Due Process violations and setting forth criteria to be used by fact finder in determining fault under new rule). The option was not added to provide defendants with a forum to explain the meaning of their offers. Although the Rule allows a court to consider whether a written offer of a structured settlement constitutes an offer within the terms of the rule, Pa.R.C.P. 238 (b) (1) (ii) , such an inquiry is extremely specialized and irrelevant to the present issue.

would not be awarded delay damages after rejecting an offer, the amount of which was believed to be, and which proved be, inadequate.

Therefore, in accordance with the common and approved usage of the language of Rule 238; in light of this Rule's underlying purposes; and mindful of the potential inequities inherent in any interpretation of an ambiguous offer, "specific sum" should be read strictly to mean a precise monetary amount. In turn, defendant's highest written offer of $46,000 plus "Plaintiffs' out-of-pocket expenses" does not amount to a "specific sum;" and delay damages properly were imposed beyond November 10, 1989, and up to April 18, 1991, when the verdict was returned in plaintiffs' favor.

Conclusion

As discussed above, all of defendant's arguments against imposition of delay damages were properly denied. Therefore, in accordance with Rule 238, the plaintiffs' verdicts were molded to incorporate delay damages from July 28, 1986 through April 18, 1991.

BY THE COURT:

/s/ Katz
LEON KATZ, J.

DATED: July 30, 1991

George J. O'Neill, Esq. Attorney for Plaintiffs
I.D. No. 04145

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CARLETTA J. SOHN and JONG SOO SOHN	:	
	:	COURT OF COMMON PLEAS
v.	:	PHILADELPHIA COUNTY
JOHN LUPARELLI, ADMINISTRATOR OF THE ESTATE OF RICHARD R. LUPARELLI, DECEASED	:	JULY TERM, 1986
	:	NO. 4419

PLAINTIFFS' MOTION FOR AN AWARD OF DAMAGES FOR DELAY PURSUANT TO PA. R.C.P. NO. 238

AND NOW, this 23rd day of April, 1991, Carletta J. Sohn, plaintiff, and Jong Soo Sohn, plaintiff, move this Honorable Court to award damages for delay pursuant to Pa.R.C.P. No. 238, upon the verdicts rendered in favor of the plaintiffs in the above action on April 18, 1991, and to mold said verdicts to include said damages for delay assessed against John Luparelli, as Administrator of the Estate of Richard R. Luparelli, Deceased, defendant. In support thereof, plaintiffs assign the following reasons:

1. The cause of action arose when plaintiffs were injured in an automobile accident on February 21, 1985, caused by the negligence of decedent.

2. The Complaint commencing this action was filed on July 28, 1986.

3. There were two written offers "of settlement in a specified sum"[1] submitted by the defendant. The first was for

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1. Pa.R.C.P. No. 238(b) provides:
"The period of time for which damages for delay shall be calculated under subdivision (a) (2) shall exclude the period of time, if any,
"(1) after which the defendant has made a written offer of
"(i) settlement in a specified sum with prompt cash payment to the plaintiff

$35,000.00 by letter dated June 10, 1988, from J. Vincent Roche, Esq., then counsel for defendant. A copy thereof is annexed hereto as Exhibit A. The second was for $46,000.00 by letter dated July 14, 1988, from said attorney. A copy thereof is annexed hereto as Exhibit B.

4. A third letter from Mr. Roche, dated November 10, 1989, [attached hereto as Exhibit C], stated the defendant "hereby augments that amount by Plaintiffs' out-of-pocket expenses" without designating what he thought those expenses totalled. Hence the offer was not "in a specified sum". By letter dated April 26, 1990, [attached hereto as Exhibit D), defendant's insurer, Harleysville Mutual Insurance Company, disclaimed any knowledge of the "offer" set forth in Exhibit C and thereafter retracted it.[2]

5. There,was no delay of the trial of this action caused by the plaintiffs. The case was continued on one occasion because defendant's counsel had failed to answer plaintiffs' interrogatories and because of defendant's delay in appointing and substituting an administrator for the deceased defendant in this action.

6. Delay damages are calculated on the verdict of $64,250.00 in favor of Carletta J. Sohn, plaintiff, pursuant to the' requirements of the Rule as follows:

YEAR	PRIME RATE + 1	FROM	TO	No. of Days	Interest for the period
1986	10.50%	Jul 28,1986	Dec 31, 1986	156	2,883.33
1987	8.50%	Jan 1,1987	Dec 31, 1987	365	5,461.25
1988	9.75%	Jan 1,1988	Dec 31, 1988	365	6,281.54
1989	11.50%	Jan 1,1989	Dec 31, 1989	365	7,388.75
1990	11.50%	Jan 1,1990	Dec 31, 1990	365	7,388.75
1991	11.00%	Jan 1,1991	Apr 18, 1991	108	2,091.21
TOTAL:					31,494.82

" * * * and the plaintiff did not recover by award, verdict or decision, exclusive of damages for delay, more than 125 per cent of either the specified sum * * *."

2. An offer of $50,000.00 was first made at a Settlement Conference before the Hon. Murray Goldman on January 22, 1991. It was never made in writing. This was defendant's highest firm offer of settlement. The verdicts total more than 125 per cent of any offer made by defendant.

7. Delay damages are calculated on the verdict of $8,250.00 in favor of Jong Soo Sohn, plaintiff, pursuant to the requirements of the Rule as follows:

YEAR	PRIME RATE + 1	FROM	TO	No. of Days	Interest for the period
1986	10.50%	Jul 28, 1986	Dec 31, 1986	156	370.23
1987	8.50%	Jan 1, 1987	Dec 31, 1987	365	701.25
1988	9.75%	Jan 1, 1988	Dec 31, 1988	365	806.58
1989	11.50%	Jan 1, 1989	Dec 31, 1989	365	948.75
1990	11.50%	Jan 1, 1990	Dec 31, 1990	365	948.75
1991	11.00%	Jan 1, 1991	Apr 18, 1991	108	268.52
TOTAL:					4,044.08

8. The verdicts should be molded to incorporate damages for delay as follows:

a. In favor of Carletta J. Sohn, plaintiff, and against John Luparelli, Administrator of the Estate of Richard R. Luparelli, Deceased, defendant in the sum of $95,744.82.

b. In favor of Jong Soo Sohn, plaintiff, and against John Luparelli, Administrator of the Estate of Richard R. Luparelli, Deceased, defendant in the amount of $12,294.08.

/s/ George J. O'Neill

George J. O'Neill,
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CARLETTA J. SOHN and JONG SOO SOHN	:	Philadelphia County
	:	COURT OF COMMON PLEAS
vs.	:	July Term, 1986
JOHN LUPARELLI, Administrator of the Estate of Richard R. Luparelli, Deceased	:	No. 4419

ANSWER TO MOTION FOR DELAY DAMAGES FILED BY DEFENDANT: JOHN LUPARELLI, ADMINISTRATOR OF THE ESTATE OF RICHARD R. LUPARELLI, DECEASED AND STATEMENT OF OPPOSITION TO IMPOSITION OF DAMAGES FOR DELAY

1. Admitted.
2. Admitted.
3. Denied as stated. Procedurally, plaintiff's statement in this paragraph is erroneous. The defendant, Estate of Richard Luparelli was substituted for deceased defendant, Richard Luparellli on April 15, 1991. Plaintiff's factual statement is likewise erroneous as three separate offers were communicated by the attorney for Mr. Luparelli. The first, for $35,000.00 was communicated on June 10, 1988 via letter from J. Vincent Roche, Esquire of the firm Margolis, Edelstein, Scherlis, Sarowitz and Kraemer, then counsel for the defendant. A second offer was communicated for a stated sum of $46,000.00 by letter dated July 14, 1988 by the same counsel. A third letter dated November 10, 1989 increased the offer to "$46,000.00 plus plaintiff's out of pocket expenses". Please see Exhibits A, B and C appended to plaintiff's motion.
4. Denied as stated. It is specifically denied that the offer communicated in the letter of November 10, 1989 was not in a "specified sum". This offer followed substantial discovery and

several communications from plaintiff's attorney explaining exactly what his client's out of pocket were. Thus, the communication of an offer of $46,000.00 plus "plaintiff's out of pocket expenses" was a specified sum. Furthermore, the plaintiff's attorney certainly understood the amount of the offer as he responded to the defendant's insurance carrier that "Mr. and Mrs. Sohn rejected that offer, which I believe amounted to $86,000.00 on November 27, 1989. My clients are still willing to settle their claims for $250,000.00". See Exhibit A attached herewith. It is admitted that the representative of the insurance carrier may have been personally unaware that the offer had been extended by counsel. However, the offer was never withdrawn in writing but was rather simply rejected by the plaintiffs as insufficient.

5. Admitted that plaintiffs caused no delay in trial. Also, the defendants caused no delay in this matter. The case was continued for a short time to allow a member of the decedent's family to request letters of administration. The delay in the trial of this case was caused merely by the backlog of cases pending in this county.

6. Denied. Delay damages in this case are inappropriate. Furthermore, Rule 238 as it is currently designed and interpreted is unconstitutional.

NEW MATTER – STATEMENT OF OPPOSITION TO IMPOSITION OF DELAY DAMAGES

1. Delay damages should not be imposed against John Luparelli, Administrator of the Estate of Richard Luparelli as said party was joined to this action on April 15, 1991, one day prior to the commencement of trial of this case.

2. Delay damages should not be imposed against the defendant for the period of time between the death of Richard Luparelli, August 6, 1988 through April 15, 1991, the date on which defendant, John Luparelli was substituted for decedent. Letters of administration were issued within one week prior to the date of substitution.

3. Delay damages should not be imposed upon decedent or decedent's estate as the decedent and the decedent's estate did nothing to delay trial of this matter.

4. On November 27, 1989 an offer of settlement was communicated to the plaintiff's attorney in writing for the amount of $46,000.00 plus plaintiff's out of pocket expenses. These amounts were known to all parties by that date and were understood by plaintiff's attorney to provide a written settlement offer of $86,000.00. This amount was rejected by plaintiff's attorney. This amount of was *in excess of* the verdict returned by the jury to Mr. and Mrs. Sohn. Thus no damages may attach post November 27, 1989.

5. Delay damages are inappropriate as the defendants' representatives consistently attempted to negotiate settlement of this case in good faith. Each settlement offer extended by the defendants' representatives were rejected by the plaintiff's attorney. As late as December of 1990 the plaintiff refused to move from a settlement demand of $250,000.00.

6. Delay damages should not be calculated in this case from the date of the filing of plaintiff's complaint but rather, from a date one year following service of plaintiff's complaint. Imposition of damages from early date would constitute denial of equal protection of the laws, contrary to the guarantees of the United States and Pennsylvania constitutions.

7. To the extent that the calculation of delay damages is based on an examination of conduct of the defendant solely, the Rule is violative of the guarantees of equal protection under the laws which are so nobly embodied in the United States and Pennsylvania constitutions.

8 To the extent that calculation of delay damage under current Rule 238 imposes damages upon the defendant without a showing of fault of the defendant in causing a delay in trial, the rule is violative of the due process clauses of the Pennsylvania and United States constitutions.

9. In promulgating current Rule 238 the Pennsylvania Supreme Court exceeded its authorities to promulgate procedural rule and has, instead, effected a substantive change in the law. As such, the Supreme Court exceeded its authority and the Rule is therefore constitutional.

WHEREFORE, defendant respectfully requests that the plaintiff's motion for delay damage be denied.

GALLAGHER, REILLY & LACHAT

BY: /s/ Richard K. Hohn

RICHARD K. HOHN, ESQUIRE

MARGOLIS, EDELSTEIN, SCHERLIS, SAROWITZ AND KRAEMER
ATTORNEYS AT LAW
THIRD FLOOR
1315 WALNUT STREET
PHILADELPHIA, PA 19107-4761
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(215) 732-3838
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NEW JERSEY OFFICE
216 HADDON AVENUE
WESTMONT NJ 08108
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(609) 858-7200

J. VINCENT ROCHE
DIRECT DIAL (215) 875-1831

OUR FILE 40000-401

June 10, 1988

George J O'Neill, Esquire
Suite 1200 Merlin Tower
1518 Walnut Street
Philadelphia, PA 19102

Re: Sohn, et ux vs. Luparelli, et al
CCP 8607-4419

Dear Mr. O'Neill:

Regarding the above captioned lawsuit, Defendant hereby tenders the sum of $35,000 to Plaintiffs in full and complete settlement of their claims. Upon word from you, I will draft and submit the condign closing instrument.

Very truly yours,

/s/ J. Vincent Roche
J. VINCENT ROCHE

JVR:km
cc: James F. Zaccaria, Esquire

GEORGE J. O'NEILL
ATTORNEY AT LAW
SUITE 1200 MERLIN TOWER
1518 WALNUT STREET
PHILADELPHIA, PA. 19102

735-2883
AREA CODE 215

June 27, 1988

J. Vincent Roche, Esquire
1315 Walnut Street, 3rd Floor
Philadelphia, Pa. 19107-4761

Re: Carletta J. Sohn and Jong Soo Sohn
v. Richard R. Luparelli
Your File No. 40000-401

Dear Mr. Roche:

Your offer of $35,000.00 in settlement was communicated to my clients and they rejected your offer.

Very truly yours,

/s/ George J. O'Neill
George J. O'Neill

GJO: to
cc: Mr. and Mrs. Sohn

MARGOLIS, EDELSTEIN, SCHERLIS, SAROWITZ AND KRAEMER
ATTORNEYS AT LAW
THIRD FLOOR
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NEW JERSEY OFFICE
216 HADDON AVENUE
WESTMONT NJ 08108
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(609) 858-7200

J. VINCENT ROCHE
DIRECT DIAL (215) 875-1837

OUR FILE
40000-401

July 14, 1988

George J. O'Neill, Esquire
1200 Merlin Tower
1518 Walnut Street
Philadelphia, PA 19102

RE: Sohn, et ux vs. Luparelli, et al
CCP 8607-4419

Dear Mr. O'Neill:

Thank you for your recent missive delineating the special damages of Plaintiffs in the above captioned lawsuit. In light of them, I am augmenting Defendant's offer to $46,000.00. Kindly convey that magnanimous offer to your clients and apprise me of their reaction.

Very truly yours,

/s/ J. Vincent Roche
J. VINCENT ROCHE

JVR/sam
cc James F. Zaccaria, Esquire

GEORGE J. O'NEILL
ATTORNEY AT LAW
SUITE 1200 MERLIN TOWER
1518 WALNUT STREET
PHILADELPHIA, PA. 19102

735-2883
AREA CODE 215

July 27, 1988

J. Vincent Roche, Esquire
1315 Walnut Street, 3rd Floor
Philadelphia, Pa. 19107-4761

Re: Carletta J. Sohn and Jong Soo Sohn
v. Richard R. Luparelli
Your File No. 40000-401

Dear Mr. Roche:

Your offer of $46,000.00 in settlement was communicated to my clients and they rejected your offer.

Very truly yours,

/s/ George J. O'Neill
George J. O'Neill

GJO: to
cc: Mr. and Mrs. Sohn

MARGOLIS, EDELSTEIN, SCHERLIS, SAROWITZ AND KRAEMER
ATTORNEYS AT LAW
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216 HADDON AVENUE
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(609) 858-7200

J. VINCENT ROCHE
DIRECT DIAL (215) 875-1831

OUR FILE
40000-401

November 10, 1989

George J. O'Neill, Esquire
Merlin Tower – Suite 1200
1518 Walnut Street
Philadelphia, PA 19102

Re: Sohn, et ux vs. Luparelli, et al
CCP 8607-4419

Dear Mr. O'Neill:

Concerning the case captioned above, please be advised that I have yet to unearth any heirs of Defendant. I have an investigator trying to track down the last known one and will keep you fully apprised.

In reviewing my file, I note that a prior offer of $46,000 was tendered to but rejected by Plaintiffs. Defendant hereby augments that amount by Plaintiffs' out-of-pocket expenses. Upon word from you, I will draft and submit the condign closing instrument.

Very truly yours,

/s/ J. Vincent Roche
J. VINCENT ROCHE

JVR: dfl
cc: James F. Zaccaria, Esquire

GEORGE J. O'NEILL
ATTORNEY AT LAW
SUITE 1200
1518 WALNUT STREET
PHILADELPHIA, PA. 19102

735-2883
AREA CODE 215

April 26, 1990

Nancy McKettrick
Harleysville Mutual Insurance Company
220 Commerce Drive, Suite 410
Fort Washington, Pa. 19034

Re: Your Insured: Joseph Ricca
Your Claim No: A40-26-12-69
D/A: 2/12/85
My Clients: Carletta Sohn and
Jong Soo Sohn

Dear Ms. McKettrick:

In compliance with your request of this date, I enclose a copy of Mr. Roche's letter of November 10, 1989, which had my note of 11-13-89 attached. Mr. and Mrs. Sohn rejected that offer, which I believed amounted to $86,000.00, on November 27, 1989.

My clients are still willing to settle their claims for $250,000.00.

Very truly yours,

/s/ George J. O'Neill
George J. O'Neill

GJO: ado
cc: Mr. Mrs. Sohn

George J. O'Neill, Esq. Attorney for Plaintiffs
I.D.No. 04145
Suite 1200 Merlin Tower
1518 Walnut Street
Philadelphia, Pa. 19102
(215) 735-2883

THIS IS NOT AN ARBITRATION CASE
ASSESSMENT OF DAMAGES HEARING IS NOT REQUIRED
JURY TRIAL DEMANDED

CARLETTA J. SOHN and JONG SOO SOHN 811 Birch Court Village Square Apartments Bensalem, Pa. 19020	IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY DIVISION
vs.	
RICHARD R. LUPARELLI, 710 East Byberry Road Philadelphia, Pa. 19116	JULY TERM, 1986 NO. 4419

COMPLAINT

NOTICE

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within thirty (30) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court our defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

LAWYER REFERENCE SERVICE
One Reading Center, 11th Fl.
11th and Market Streets
Philadelphia, Pa. 19107
(215) 238-1701

AVISQ

Le han demandado a usted en la corte. Si usted quiere defenderse de estas demandas expuestas en las páginas siguientes, usted tiene treintas (30) dias de plazo al partir de la fecha de la demanda y la notificación. Hace falta asentar una comparencia escrita o en persona o con un abogado y entregar a la corte en forma escrita sus defensas o sus objeciones a las demandas en contra de su persona. Sea avisado que si usted no se defiende, la corte tomará medidas y puede continuar la demanda en contra suya sin previo aviso o notificación. Además, la corte puede decidir a favor del demandante y requiere que usted cumpla con todas las provisiones de esta demanda. Usted puede perder dinero o sus propoiedades u otros derechos importantes para usted.

LLEVE ESTA DEMANDA A UN ABOGADO IMMEDIATEMENTE. SI NO TIENE ABOGADO O SI NO TIENE EL DINERO SUFICIENTE DE PAGAR TAL SERVICIO, VAYA EN PERSONA O LLAME POR TELÉFONO A LA OFICINA CUYA DIRECCIÓN SE ENCUENTRA ESCRITA ABAJO PARA AVERIGUAR DONDE SE PUEDE CONSEGUIR ASISTENCIA LEGAL.

SERVICIO DE REFERENCIA LEGAL
One Reading Center, 11th Fl.
Filadelfia, Pennsylvania
Teléfono: (215) 238-1701

George J. O'Neill, Esq. Attorney for Plaintiffs
I.D.No. 04145
Merlin Tower, Suite 1200
1518 Walnut Street
Philadelphia, Pa. 19102
(215) 735-2883

THIS IS NOT AN ARBITRATION CASE
ASSESSMENT OF DAMAGES HEARING IS NOT REQUIRED

CARLETTA J. SOHN and JONG SOO SOHN 811 Birch Court Village Square Apartments Bensalem, Pa. 19020	:	IN THE COURT OF COMMON PLEAS PHILADELPHIA COUNTY TRIAL DIVISION
v.	:	CIVIL ACTION JURY TRIAL DEMANDED
RICHARD LUPARELLI, 710 East Byberry Road Philadelphia, Pa. 19116	:	NO.

COMPLAINT

1. Jong Soo Sohn and Carletta J. Sohn, plaintiffs, are husband and wife and reside at 811 Birch Court, Village Square Apartments, Bensalem, Pa.

2. Richard R. Luparelli, defendant, was last known to reside at 710 East Byberry Road, Philadelphia, Pa., 19116.

3. On February 21, 1985, at about 10:04 P.M., Jong Soo Sohn, husband-plaintiff, was operating a 1973 Ford Mustang in a northerly direction on Hulmeville Road, a two lane highway in Bensalem, Pa., when defendant Richard R. Luparelli, who was operating 1972 Ford Torino in a southerly direction on the same highway, recklessly crossed over the center-line into the north-bound traffic lane and collided with plaintiffs' vehicle, as a result of which plaintiffs sustained serious personal injuries.

4. The collision was caused by the negligence and wanton, wilful, reckless misconduct of the defendant in that:

a. He was operating his vehicle on the wrong side of the road;

b. He was operating his vehicle at an excessive speed under the circumstances;

c. He violated the rules provided by the Pa. Vehicle Code governing the passing of other vehicles;

d. He failed to make reasonable observations of the road before him before attempting to pass another vehicle while operating on a two-lane highway, and failed to observe the position of plaintiffs' vehicle on the highway before proceeding;

e. He failed to keep his vehicle under reasonable and proper control;

f. He failed to yield the right of way, failed to give warning, and otherwise violated the rules of the road;

g. He failed to exercise reasonable care under all of the circumstances; and

h. He operated his vehicle in violation of the Vehicle Code of Pennsylvania and local ordinances governing the operation of automobiles and the control of traffic in the area.

FIRST CAUSE OF ACTION

Carletta J. Sohn v. Richard R. Luparelli

5. The allegations of paragraphs 1 through 4 of this Complaint are incorporated herein by reference.

6. As a result of the collision, Carletta J. Sohn, wife-plaintiff, sustained injuries to her head, cerebral concussion, with contusion and abrasions of the frontal area, both temporal mandibular joints, contusion of the mouth, laceration of the mucosa of the lower lip, neck, contusion and ecchymosis of the left arm, sprain of the joint of the right middle finger and internal derangement of the right knee, contusion and hematoma of the right leg, sprain of the cervical and lumbosacral spines, their bones, vertebrae, intervertebral discs, tendons, ligaments, cartilages, muscles, blood vessels, nerves and soft tissues, and adjacent parts of her body. Her injuries and her witnessing of the injuries to her husband have caused wife-plaintiff to suffer pain, discomfort, disability, mental and emotional distress, sleeplessness, humiliation, traumatic neuroses, depression, anxiety, fear, worry and nervousness. Some of the residual effects of her injuries continue to the present and will be permanent.

7. As a result of the injuries and disabilities sustained by her husband, Jong Soo Sohn, wife-plaintiff Carletta Sohn sustained loss of consortium and loss of his services, society and

companionship and sustained disruption of her family life, and will continue to sustain such damages.

8. The injuries sustained by Carletta J. Sohn, wife-plaintiff, have prevented her from performing her usual occupation and employment, resulting in loss of her usual earnings and earning power. They have also prevented her from performing her usual household duties, daily activities and recreations. By reason thereof, she has sustained a loss of life's pleasures. She has suffered great inconvenience and loss of time in caring for and obtaining treatment of her injuries. She will probably experience these disabilities and losses of earning power for an indefinite time in the future.

9. The residual effects of plaintiff's said injuries have had and will have permanent adverse effects on her health and will cause her to suffer further damages, similar to those described above, for an indefinite time in the future.

10. By reason of the injuries sustained by wife-plaintiff, she has had to incur various hospital, surgical, medical, and other expenses in an effort to treat and cure her injuries.

WHEREFORE, Carletta J. Sohn, wife-plaintiff, demands judgment against Richard R. Luparelli, defendant, for a sum in excess of $20,000.00.

SECOND CAUSE OF ACTION

Jong Soo Sohn v. Richard R. Luparelli

11. The allegations of paragraphs 1 through 4 of this Complaint are incorporated herein by reference.

12. The negligence of defendant proximately caused Jong Soo Sohn, husband-plaintiff, to sustain injuries to his head, with abrasion to the left frontal area, contusion and hematoma of the left elbow, contusion of the left leg, sprain of the cervical and lumbosacral spines, their bones, vertebrae, intervertebral discs, tendons, ligaments, cartilages, muscles, blood vessels, nerves and soft tissues, and adjacent parts of his body. His injuries and his witnessing of the injuries to his wife have caused him to

suffer pain, discomfort, disability, mental and emotional distress, sleeplessness, humiliation, traumatic neuroses, depression, anxiety, fear, worry and nervousness. Some of the residual effects of his injuries continue to the present and will be permanent.

13. As a result of the injuries and disabilities sustained by his wife, Carletta Sohn, husband-plaintiff Jong Soo Sohn sustained loss of consortium and loss of her services, society and companionship and sustained disruption of his family life, and will continue to sustain such damages.

14. The injuries sustained by Jong Soo Sohn, husband-plaintiff, and the injuries sustained by Carletta Sohn, his wife, have prevented him from performing his usual occupation and employment, resulting in loss of his usual earnings and earning power. They have also prevented him from performing his usual household duties, daily activities and recreations and have caused him to suffer a loss of life's pleasures. He has suffered great inconvenience and loss of time in caring for and obtaining treatment of his injuries and those of his wife. He may experience these disabilities and losses of earning power in the future.

15. Husband-plaintiff has had to incur various hospital, surgical, medical, and other expenses in an effort to treat and cure his injuries and those suffered by his wife.

WHEREFORE, Jong Soo Sohn, husband-plaintiff, demands judgment against Richard R. Luparelli, defendant, for a sum in excess of $20,000.00.

/s/ George J. O'Neill
George J. O'Neill,
Attorney for Plaintiffs

COMMONWEALTH OF PENNSYLVANIA :
COUNTY OF PHILADELPHIA : ss

CARLETTA J. SOHN being duly sworn according to law, deposes and says that she is the plaintiff above named and that the facts set forth in the attached pleading are true, to the best of her knowledge, information and belief.

/s/ Carletta J. Sohn

SWORN TO AND SUBSCRIBED BEFORE ME THIS 24th DAY OF JULY, 1986.

/s/ Andrea Rozinski
ANDREA ROZINSKI
A Foreign Commissioner of Deeds
for New Jersey in Pennsylvania
My Commission Expires Sept. 14, 1989

Supreme Court, U.S.
FILED
OCT - 3 1993
CLERK

No. 93-232

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

JOHN A. LUPARELLI, Administrator of the Estate of RICHARD R. LUPARELLI, Deceased,
Petitioner

v.

CARLETTA J. SOHN and JONG SOO SOHN,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION

George J. O'Neill
4128 Chalfont Drive,
P.O. Box 21184
Philadelphia, Pa. 19114-0384
(215) 735-2883
Member of the Bar and
Attorney for Respondents

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BRIEF IN OPPOSITION

Petitioner questions the constitutionality of Pa.R.C.P. No. 238 under the due process and equal protection clauses of the Fourteenth Amendment. All of the constitutional issues which his petition raises been considered and rejected by the Supreme Court of Pennsylvania, [1] the Superior Court of Pennsylvania, [2] and the Court of Appeals for the Third Circuit. [3] Petitioner has not asserted any argument which would require this Honorable Court to overrule those

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[1] **Laudenberger v. Port Authority of Allegheny County**, 496 Pa. 52, 436 A.2d 147 (1981) [Former Rule 238 valid under both the state and federal constitutions]. The rationale of **Laudenberger** was specifically preserved by **Craig v. Magee Memorial Rehabilitation Center**, 512 Pa. 60, 515 A.2d 1350, 1353 (1986), and reiterated in **Costa v. Lauderdale Beach Hotel**, ___ Pa. ___, 626 A.2d 566, 568 (1993).

[2] See **Dranzo v. Winterhalter**, 395 Pa.Super. 578, 595, 577 A.2d 1349, 1357 (1990) appeal denied, ___ Pa. ____, 585 A.2d 468 (1991); **Dietrich v. J.I. Case Co.**, 390 Pa.Super. 475, 489-91, 568 A.2d 1272, 1279-80 (1990) and **Shellhamer v. Grey**, 390 Pa.Super. 122, 129, 568 A.2d 224, 228 (1989).

[3] **Knight v. Tape, Inc.**, 935 F.2d 617 (3d Cir., 6/7/91), rehearing den. (7/29/91). The complete history of Rule 238 is reviewed in Judge Becker's thorough opinion. See also, **Simmons v. City of Philadelphia**, 947 F.2d 1042 (3rd Cir. 1991).

well-reasoned decisions. Consequently, there is no reason why the petition should be granted.

Legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. ***Cleburne v. Cleburne Living Center,*** 473 U.S. 432, 439-40, 105 S.Ct 3249, 3254, 87 L.Ed.2d 313 (1985).

The Supreme Court of Pennsylvania, in ***Laudenberger v. Port Authority of Allegheny County, supra,*** held that Rule 238 did not violate substantive due process because the rule was rationally related to legitimate state goals of promoting settlements and relieving court congestion and delay. ***Id.*** at 70-1, 436 A.2d at 156-7. ***Cf. Rogin v. Bensalem,*** 616 F.2d 680, 689 (3rd Cir. 1980), ***cert. denied,*** 450 U.S. 1029, 101 S.Ct. 1737, 68 L.Ed.2d 223 (1981). It cannot be disputed that such goals are a proper concern of the Supreme Court of Pennsylvania.

The Court of Appeals for the Third Circuit held that Rule 238 rationally promotes the goal of motivating settlements to reduce court delay by providing a financial incentive for defendants to make a reasonable offer of settlement, which the court found to be a sufficiently rational nexus to satisfy due process. ***Knight v. Tape, Inc.,*** 935 F.2d 617, 627-8 (3rd Cir. 1991). The decisions cited in footnotes 1 to 3 also found that the rule did not violate the equal protection clause in that there were sufficient rational

differences in the circumstances of plaintiffs and defendants to justify the classification and the differences in treatment under the rule. [4]

All defendant's insurer had to do to avoid having to pay delay damages to respondents was to comply with Rule 238's modest requirements: Make a written offer to settle for a specific sum within 80 per cent of the ultimate verdicts and keep it open for at least ninety days, or until trial if that should occur earlier. If respondents rejected such an offer, they would forfeit any additional delay damages for the period the offer was outstanding. By taking such simple action, wholly within its own control, it could have precluded the successful plaintiffs from recovering delay damages thereafter. It could keep whatever income it derived from plaintiffs' damages during the period that it retained those damages. Correspondingly, plaintiffs would gain nothing by making an excessive demand: they would lose delay damages as well as income they could have derived from the funds of an earlier settlement.

---

[4] In **Laudenberger** the Pennsylvania Supreme Court found that Rule 238 did not offend equal protection because the distinction between plaintiffs and defendants was reasonable: "the plaintiffs have been wrongly injured and have suffered financial losses because of the defendants' action". *Id.* at 68-9, 436 A.2d at 156-7; followed, **Costa v. Lauderdale Beach Hotel**, *supra*, at 626 A.2d 569.

There is nothing "unfair" to petitioner in this system nor does it deny them equal protection of law. Both parties run the risk of losing additional money if their respective evaluations of the case are too far off the mark, that is, the ultimate verdict. But while awaiting the trial that produces that verdict, the defendant's insurer gets to keep and invest the money. If the income it derives from it is greater than the delay damages it ultimately must pay, it has profited. If the income is equal to or less than the delay damages, it has a complete offset or, at least, a reduction of such damages. See, **Schrock v. Albert Einstein Med. Ctr.**, 386 Pa.Super. 215, 562 A.2d 875, 877 (1991), aff'd, 527 Pa. 191, 589 A.2d 1103, 1106-7 (1991). Plaintiffs do not have a corresponding offset when they overvalue their damages.

In short, inability to settle a case early because of faulty evaluations actually hurts plaintiffs more than it does defendants, even if the latter must ultimately pay damages for the delay of trials not caused by defendants, but unavoidably caused by judicial administration.

The petition's repeated references to the damages assessed in this case as "50 per cent of the jury award" are inexact and may be misleading. Delay damages were assessed at the "prime rate plus 1", simple interest, as determined at the beginning of each year following the filing of the Complaint on July 28, 1986, until the verdicts were rendered on

April 18, 1991. [A-23,24]. It is quite likely that during this period defendant's insurer was able to earn more than that rate, compounded, on the sums for which defendant was found liable to plaintiffs. *Costa v. Lauderdale Beach Hotel,* ____ Pa. ____, 626 A.2d 566, 569 fn. 6 (1993)[Delay damages prevents such unjust enrichment of defendants]. It is certain that the plaintiffs were deprived of their damages over those years and lost whatever income those funds could have generated during the period that payment was delayed by the insurer. *Knight v. Tape, Inc.*, 935 F.2d 617, 628-9, fn. 11 (3rd Cir. 1991); *Laudenberger v. Port Authority of Allegheny County,* 496 Pa. 52, 65-6, 436 A.2d 147, 154-5 (1981). *See also, e.g. Schrock v. Albert Einstein Medical Center,* 527 Pa. 191, 589 A.2d 1103 (1991); *Trans-Global Alloy, Ltd. v. First National Bank of Jefferson Parish,* 583 So.2d 443, 457-8 (La. 1991).

While Rule 238 is intended to motivate both parties to make realistic offers of settlement while awaiting trial, it is also designed to provide financial motivation for both parties to avoid actions or inaction which cause delays in the scheduling of trials. The rule provides a rational means of relieving court congestion, while remedying to some degree the unjust enrichment of defendants and the financial damage suffered by plaintiffs caused by the delays in reaching trial. *Laudenberger v. Port Authority of Allegheny County,* 496 Pa. 52, 68-9, 436 A.2d 147, 156 (1981).

Contrary to petitioner's assertion at p. 7 of his Petition, the trial court ***never*** ruled that Pa.R.C.P. No. 238 required an ***"automatic"*** imposition of delay damages against petitioner. The rule itself provides for a hearing, when an issue of fact exists, before any delay damages are awarded. It states, 'If an issue of fact is raised the court may, in its discretion, hold a hearing before entering an appropriate order." [Petition, p. 5]. Defendant's lack of fault in causing delay and plaintiffs' unwillingness to reduce their demand in light of the defendant/insurer's offers were facts admitted by plaintiffs, so there was no factual issue to be decided. The trial court's award of damages for delay was entered after full and cogent consideration of the admitted facts and the arguments advanced by petitioner in his pleadings and briefs. The award was not "automatic" although Rule 238, under the admitted facts, required the award of delay damages.

The petition is also misleading in representing that "petitioner had continually attempted to settle the case throughout the litigation". [A-7]. In this case defendant admitted liability,[5] yet the defendant's insurer made only three inadequate offers of settlement during the six years and two months that followed the subject accident: $35,000.00 on June 10,

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[5] Luparelli had struck the Sohn's vehicle head-on on their side of the road in the course of attempting to pass another vehicle.

1988, [A-29]; $46,000.00 on July 14, 1988, [A-31] and $50,000.00 on January 22, 1991, [A-23]. Each of the three offers were rejected immediately by the Sohns. In light of the evidence of Carletta Sohn's permanent injuries and residual disabilities, her life expectancy of 38.4 years and plaintiffs' out-of-pocket losses, [6] plaintiffs' rejections of defendant's offers and their demand of $250,000.00 were justified.

The defendant/insurer in this case has not been deprived of *its* property without due process of law. The "property" to which it refers consists of part of its income on the $72,500.00 in damages owed to plaintiffs, as determined by the verdicts, which it detained for over six years. Neither substantive nor procedural due process was violated when Rule 238 was applied to secure restitution of the full indebtedness; nor has petitioner been deprived of the equal protection of the law by the mandates or the administration of Rule 238.

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[6] At the time of the settlement conference of January 22, 1991, the Sohn's medical expenses totalled $20,195.44, of which $10,000.00 had been paid by their own insurance (the limits of their "No-Fault" coverage). Their lost earnings totalled $15,054.33, of which their own insurance covered and reimbursed them for $5,000.00. [A-13, fn.1, and Plaintiffs' Settlement Conference Memorandum]. Therefore, their unreimbursed economic losses totalled $20,249.77. The insurer offered them $50,000.00 in settlement.

Conclusion

For the foregoing reasons, respondents respectfully this Court to deny the petition for a writ of certiorari to the Superior Court of Pennsylvania.

Respectfully submitted,

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